

AN UNLIKELY HERO?

THE ORIGINS OF AFFIRMATIVE ACTION DURING  
THE NIXON ADMINISTRATION

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Thesis submitted to the University of Nottingham  
for the degree of Doctor of Philosophy, March 2001.



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## Abstract

The dissertation builds upon the question of why Nixon, a Republican, implemented the first affirmative action programs. It is divided into three parts. The first charts the liberal approach to race relations and the crisis that attended its collapse. As Habermas noted, a “legitimation crisis” affected private institutions necessitating a new round of government intervention. This section explores the idea that affirmative action was part of this legitimation crisis, an administrative replacement for the failure of the post-war hope that racism would disappear after the destruction of formal barriers to black equality.

The second looks at the interventions of the Nixon administration. It argues that the Philadelphia Plan was less important in terms of later affirmative action than is usually thought. Other programs (such as the OMBE) developed around the same time became more significant. 1970 became the year that programs aimed at reforming ghettos transformed into programs aimed at strengthening the black middle-class. Nixon, though often characterised as “apricipled,” had what Garry Wills termed “the right to earn” in mind when pushing through the Philadelphia Plan in Congress. All Americans – black and white – should have this right, he reasoned. The present-day sides of the argument had yet to be formed and in 1972 Nixon saw no fundamental contradiction in insisting that quotas not curtail the rights of white workers.

The third section examines why the *issue* of affirmative action seemed to follow the implementation of affirmative action programs. Here, it is suggested that the changing intellectual climate surrounding the introduction of the first affirmative action programs transformed piecemeal civil rights programs into a broad policy model *and* ensured that controversy followed. Early affirmative action policies, this section demonstrates, caused little controversy before (at least) 1973. The sides of the debate had yet to be formed. John Rawls’ work is examined as an expression of the need to replace liberal institutions – such as the allocation of resources on the basis of merit. The Club of Rome’s *The Limits to Growth* similarly focussed attention onto the realm of distribution rather than that of production, moving from Kennedy’s perspective – “a rising tide lifts all boats” – to one of affirmative action. Affirmative action measures were both necessary as a mechanism of distribution and a constant focus of complaint as different groups argued over relative shares.

## INTRODUCTION

Many, many volumes greet the scholar or interested observer who wishes to understand the affirmative action debate in the United States today. This is not entirely surprising for an issue that has remained either in or just behind the headlines for nearly thirty years. Most of the material takes sides in a debate about whether affirmative action policies should continue to dictate how university admissions, government contracts or jobs are distributed. As such, the literature is stunningly repetitive.<sup>1</sup> Despite the plethora of material available on affirmative action, however, there is little agreement even about what exactly affirmative action is. There is also remarkable ignorance about – and, not enough interest in – the history of the policy, how this little phrase included in Kennedy's Executive Order 10925 in 1961 came to engage Americans in a way unrivalled by virtually any other question of public policy. The most important contributions to the ascent of affirmative action happened during the presidency of Richard Nixon, often, as we will see, with his direct involvement. Reconstructing this history and reconsidering exactly what affirmative action is will be the broad remit of this thesis.

The definition of affirmative action as well as questions of who exactly it benefits and whether or not affirmative action policies work remain open, but it is worth trying to establish exactly what is meant by this phrase today. In the past, affirmative action meant efforts to include members of nonwhite minorities<sup>2</sup> and (white) women in various institutions in American society. The aim of affirmative action then and now – upon which most Americans today probably agree – might be said to be a more proportional representation of all racial and ethnic groups and a reasonable gender



balance in American workplaces, colleges and business ownership. Officially, affirmative action denotes a set of policies designed to increase the proportion of women and minorities within several spheres of American life.<sup>3</sup> On March 7, 1995, President Clinton directed that a review be conducted of the Federal government's affirmative action programs. The report "analyzed federal programs that might be categorized as affirmative action."<sup>4</sup> They included everything from "outreach efforts that encourage grantmakers to seek out members of disadvantaged groups, to procurement regulations that set aside particular contracts for competitive bidding limited largely to minority-owned, economically disadvantaged small businesses."<sup>5</sup> This definition is perhaps the broadest possible. It is the discussion of *how* these programs are implemented, of the means to achieve the agreed aim, that generates controversy today. When contained in a newspaper headline, the phrase affirmative action implies "preferential treatment" for women and minorities. Opponents protest (and some defenders of affirmative action admit) that, despite the legitimate aim of affirmative action, its goals can only be achieved by "reverse discrimination," by making decisions about hiring or granting college places using race or gender considerations equal to if not more important than merit considerations.

Historically, the phrase has constantly shifted in its meaning. The phrase referred to regulatory action in the early 1930s and made its first legislative appearance in the 1935 Wagner Act. There, it asked that managers take "affirmative action" to re-employ laid off union members. It became associated with civil rights in the 1940s and 1950s, appearing in a report by Truman's Committee on Contract Compliance. Later, the term appeared in John F. Kennedy's Executive Order 10925 and again in the 1964 Civil

Rights Act;<sup>6</sup> but its meaning was still, like so many phrases, vague and open to interpretation. It appears in this context to have meant, in relation to discrimination, that something more than simply *not* discriminating was needed. During the Kennedy and Johnson presidencies the term implied voluntary efforts only and, as a concept, it remained vague throughout most of the 1960s. Edward Sylvester, in charge of the Office for Federal Contract Compliance during the Johnson administration, stated in 1968 that: “There is no fixed and firm definition of affirmative action. I would say in a general way that affirmative action is anything that you have to do to get results. But this does not necessarily include preferential treatment. The key word here is ‘results.’”<sup>7</sup> In 1969, however, the term became associated with the Philadelphia plan, the first enforced affirmative action plan that set “goals and targets” for minorities hired by construction contractors working on Federally funded contracts. Order No. 4, issued by the Department of Labor in February 1970, made affirmative action programs mandatory for all government contractors with fifty or more employees. Despite its more exacting policy meaning, the term was not controversial nor implicitly linked with “quotas” until 1972 when a controversy broke out, mainly within academic circles, about affirmative action programs.

Revised Order No. 4, issued in December of 1971 included women for the first time as an “affected class,” extending greatly the groups covered by affirmative action programs. *The New Republic*, discussing the quota issue in October 1972, stated that affirmative action was “administered in three large segments: one by the civil service over government jobs, one by HEW (the Department of Health Education and Welfare) over colleges that accept grants, and one by the Labor Department over federal

contractors.” Yet, the magazine’s editors admitted, the relationship between quotas and affirmative action was hazy.<sup>8</sup> In 1973 affirmative action programs were extended to the physically and mentally handicapped and for the purpose of bilingual education. Still, it is likely that most Americans first heard of affirmative action when Alan Bakke’s suit against the University of California Board of Regents reached the Supreme Court in 1977 (Bakke had sued because he had been denied entry to the medical school, despite being better qualified than some minority applicants who were accepted). In a parallel process, affirmative action for minority-owned businesses became an issue long after programs effecting “set asides” were initiated. In 1969 the Nixon administration began aiding minority-owned businesses in a program co-ordinated by the Office of Minority Business Enterprise (OMBE), created by Nixon in his first months of office. The Small Business Administration (SBA) administered the “8(a)” preferential procurement program for minority business (see appendix). In 1977 Congress passed the Public Works Employment Act, which earmarked 10 percent of funds for businesses owned by minorities.<sup>9</sup>

Thus the meaning of affirmative action became, in the 1970s, more inclusive and more exact. From a vague term that appeared more hopeful than realistic it grew to a regulatory mechanism deemed necessary to achieve civil rights to a controversy creating entrenched positions. Not only the meaning but the goals of affirmative action policies have also shifted over time. When first implemented, affirmative action had as its remit the expansion of job opportunities for African-Americans in the inner-cities. The stated goal at that time was to provide equal opportunities to those who had been denied them. Advocates also spoke of the goal of “remedying past discrimination” and this goal

of affirmative action has been the primary justification for its existence.<sup>10</sup> In 1970, Nixon shifted the emphasis of affirmative action programs toward creating a stable black middle-class. Implicit within this strategy was the “role model theory,” whereby those categories of people that have been discriminated against in the past are put into prominent positions in order to encourage others to follow in their footsteps. However, the US Supreme Court rejected the “role model theory” as a justification for affirmative action in 1986.<sup>11</sup>

One of the problems with “past discrimination” as a justification for affirmative action is that it makes affirmative action a temporary program. It becomes difficult to justify the continuation of affirmative action programs in terms of past discrimination thirty years after they were first implemented. The implication is that either past discrimination has been alleviated or the affirmative action programs have simply not worked. In the 1980s, largely as a response to the promised attacks on affirmative action programs by the Reagan administration, a third goal of “enhancing diversity” emerged as a reason for retaining affirmative action policies.<sup>12</sup> The idea, now widely cited as a reason for continuing affirmative action admissions policies in Universities and affirmative action within private business, is that ethnic, racial and gender diversity creates a healthy atmosphere for learning/working. Justice Lewis Powell, in the famous *Bakke* case, argued that colleges and universities have a compelling interest in having a diverse student body.<sup>13</sup> Such large American firms as Xerox have introduced “balanced workforce” plans on the basis that diversity improves the workplace. Writing in the *Harvard Business Review* in 1990, R. Roosevelt Thomas highlighted diversity as good business sense, noting that “(s)ooner or later, affirmative action will die a natural

death.” He instead promoted “diversity management,” which, as Erin Kelley and Frank Dobbin observed recently, is almost indistinguishable in practice from affirmative action programs.<sup>14</sup>

So-called “soft” affirmative action programs remain relatively unproblematic. Even the most entrenched anti-affirmative action commentators put forward few objections to “outreach,” race- or gender-conscious methods to expand applicant pools for jobs or higher education facilities. William Bennett and Terry Eastland, conservative critics of affirmative action, argued that “personal attributes such as one’s having overcome poverty, parental abuse or racial discrimination... can, and should be, taken into account” in considering university admissions.<sup>15</sup> “Hard” affirmative action refers to policies that set explicit targets for the percentage of minorities and/or women in a workplace, in college, or holding government contracts. It sets hiring or admissions goals, or sets aside government contracts based on racial or sexual categories. In other words, hard affirmative action specifically discriminates – other qualifications being equal – in favour of non-whites and women. Most discussions of affirmative action concentrate on policies affecting the workplace, on issues of hiring, promotion or firing.<sup>16</sup> However, contract “set-asides” continue to create discussion, as do preferential college admissions policies.

Controversy also extends to the intended beneficiaries of affirmative action policies. The original justification, at least, was that African-Americans had historically been discriminated against. Thus, affirmative action is a remedy for past discrimination, intended to restore blacks to the position that they would have achieved had there been no discrimination against them. Though the original intended beneficiaries

were African-Americans, the first affirmative action policies targeted “minorities,” listed in a government letter to the heads of all departments as “Negroes, Puerto Ricans, American Indians, Spanish Americans, Asians, Eskimos and Aleuts.”<sup>17</sup> By 1971, when Revised Order No. 4 was issued by the Department of Labor (DOL), women were included as affirmative action beneficiaries. The term “Spanish Americans” was later replaced by “Spanish-Speaking.” The Small Business Administration’s set-aside program 8(a) was expanded in 1979 to include “Asian Pacific Americans”; and, in the 1980s, Americans with Indian, Sri Lankan, Tongan, Indonesian, Nepalese and Bhutanese backgrounds all petitioned successfully to be included in the 8(a) program, whereas Hassidic Jews, women, disabled veterans, Iranians and Afghans all had their petitions rejected.<sup>18</sup> Many observers, both pro and anti-affirmative action, object to what they see as the corruption of the original meaning of affirmative action – to remedy past discrimination. They point out that many immigrants, such as Cubans who settled in Florida after the fall of the Batista regime, have not experienced historical discrimination within the United States.<sup>19</sup> Many object to affirmative action because it emphasises racial differences; rather, they would like to see affirmative action for all disadvantaged persons rather than racially defined groups. A debate has also emerged over whether affirmative action policies designed to help women have worked against African American men, the original intended beneficiaries.<sup>20</sup>

One controversy that muddies discussions about affirmative action concerns the question of whether affirmative action in the United States requires “quotas” of non-whites or women or whether these should be flexible “goals.” Many, if not most, defenders of affirmative action insist that quotas are wrong but goals and timetables are

good. Benjamin Hooks, former executive director of the National Association for the Advancement of Colored People (NAACP) refers to “goals and timetables, which are disparagingly called quotas by critics and opponents.” He insisted that the “NAACP has never promoted the concept of so-called quotas.”<sup>21</sup> Bill Clinton foreswore quotas in his pre-election collaborative effort with Senator Albert Gore.<sup>22</sup> Not surprisingly, his Presidential Commission found that “(q)uotas are intrinsically rigid, and intrinsically relegate qualifications and other factors to secondary status.” They found that there were no quota programs in operation by the federal government.<sup>23</sup> In fact, this argument goes back to the original discussion about the legality or otherwise of the Philadelphia plan in 1969. The Nixon administration defended the plan against charges of illegal quotas (made illegal by Title VII of the 1964 Civil Rights Act – see Appendix 1) by insisting that the affirmative action plans need only specify “goals and timetables.” In 1972, when the administration faced criticism over quotas, Nixon aide Leonard Garment used the same defence against the charges.<sup>24</sup>

However, Barbara Bergmann, another resolute defender of affirmative action, admitted, asserts that such a difference is largely semantic: “Are numerical goals and timetables the same thing as quotas? It is not unreasonable to say so.” Bergmann believes the debate is best served by defenders of affirmative action if they “acknowledge that such programs do have quotalike aspects.”<sup>25</sup> There is some support for this view to be found in Justice Powell’s summation of the *Bakke* decision. In reply to the petitioner’s claim that only “goals” and not quotas were being pursued, Powell stated: “This semantic distinction is beside the point: The special admissions program is undeniably a classification based on race and ethnic background.”<sup>26</sup> Logically, the insistence on goals

and timetables simply shifts the burden of setting the quota onto the individual employer. To reach a goal of fifteen black employees in a workforce of one hundred when only ten are employed, the employer must hire five more black employees or face increasing pressure by federal contract compliance officers and risk losing a valuable contract. Historically, even those within the Nixon administration used the term quotas when referring to programs that they insisted publicly were dealing only with goals and targets, confirming the fact that there was really little difference in practice between goals and quotas.<sup>27</sup>

No doubt (and no wonder that) affirmative action is often misunderstood. In general, the two sides of the argument are seen to divide into left/right categories, with defenders of affirmative action normally considering themselves liberal or even left-wing while those opposing affirmative action usually (but not always) have more conservative worldviews. A general point made in this thesis is that *left/right categories obscure what affirmative action really is and how it developed*. First, the polemical discussion misses the fact that affirmative action is not simply a few Federal or state policies. As Nathan Glazer observed, affirmative action has become “institutionalized” within American life.<sup>28</sup> Thus, many supporters of California’s Proposition 209 and, more recently, Washington’s I-200, hoped (and opponents of these measures feared) that affirmative action was on the way out when these measures banning racial or sexual preference in state employment, college admissions and procurement contracts were passed. The difficulties in dismantling the programs were immediately apparent. Even after Proposition 209 passed, California affirmative action programs, because of an obscure provision in the state Constitution, could continue to operate unless ordered not to by a



judge. The City of San Francisco, amongst others, promised to continue its programs whatever the stipulations within 209. Private companies continue affirmative action policies under the new rubric of “diversity management.”<sup>29</sup> In favour of 209, California’s Governor Pete Wilson was forced to file suit against his own state agencies to get a court opinion that would permanently close some of their programs. The agencies were represented by state attorneys who offered no defense of the programs. When he left office, his Democratic replacement Governor Gray Davis dropped the suit. On July 16 1999, the Democratic-controlled California Legislature gave final approval to a bill by state Senator Richard Polanco (Democratic – Los Angeles) stating that outreach programs for minorities and women are permissible under Proposition 209. The measure now goes to Davis. Those who voted for the proposition hoping that a strict merit system would soon be back in operation were frustrated by an affirmative action bureaucracy that is still well-ensconced, even in California.<sup>30</sup>

To think that affirmative action can be simply banned misses the fact that affirmative action is something larger than a few policies. As Glazer observed, the Supreme Court “will pause before considering the uprooting of processes so well established, involving thousands of employees, affecting the expectations of millions.”<sup>31</sup> “Diversity management,” as affirmative action is now called in some circles, is now sold as a way to maximise profits.<sup>32</sup> In other words, affirmative action may have begun as a number of regulatory policies by the United States Federal government but it has been incorporated so fully within the private sphere that it would continue without government regulations.<sup>33</sup> As the *Economist* magazine observed: “The public sector’s assorted affirmative action officials may find that the best way to save their pet schemes lies in

privatization.”<sup>34</sup> Originally an idea to reform American institutions, it has become an institution itself.

Concentrating narrowly on the state initiatives also misses the fact that affirmative action has become internationalised – a point often missed in American discussions. A week after voters in Houston, Texas, rejected a law that would have ended the city’s explicit preferences for awarding business contracts to women and minorities, the European Court of Justice gave encouragement to supporters of affirmative action across the European Union by upholding a German law that favours women in public-sector promotions.<sup>35</sup> In Britain, the announcement by Home Secretary Jack Straw that he would set quotas of ethnic policemen and women excited little controversy, indicating that, although affirmative action remains prohibited by the 1976 Race Relations Act, de facto affirmative action continues.<sup>36</sup> Few institutions in Britain have escaped the compulsion to seek representation. Even the reformed House of Lords must now have six percent of its members from the ethnic minority community and two and a half percent disabled. Sunita Parikh notes the existence within India of affirmative action laws (predating those in the US) designed to protect “untouchables” and “other backward castes,” or OBCs.<sup>37</sup> Affirmative action, even if it is not called affirmative action, is clearly the operational basis for much more than employment laws in California. No other civil rights initiative in the history of the United States has become such an all-pervasive system.

Historical mysteries surrounding affirmative action also confound the left/right perspective on the issue. First, why, in the face of much evidence that voluntaristic policies were not working, did administrators in the 1950s and early 1960s

refuse to consider implementing quota-based affirmative action programs? Black Americans had picketed different concerns in the 1930s, 1940s and 1950s in order to get black representation within the workforces of these concerns.<sup>38</sup> One of the original demands of the Birmingham, Alabama bus boycott in 1955/6 was that black drivers be hired for routes with primarily black customers.<sup>39</sup> Whitney Young, the executive chairman of the National Urban League (NUL) published *To Be Equal* in 1964, asking for reparations and preferential treatment for African-Americans. But Young dropped his demand in order to lend support for the passage of the 1964 Civil Rights bill. When the issue was brought up in the ensuing debate over the bill, it was dismissed out of hand by all concerned (see chapter 1). Though it was an obvious way of enforcing nondiscrimination, few would consider it until later on in the 1960s. The biggest mystery, however, is why Nixon, a conservative president who attracted the votes of Southern segregationists by promising to slow down desegregation and by opposing bussing, was the President to bring in affirmative action policies, so hated by later generations of Republicans. Though civil rights figures had previously lobbied for preferential treatment, none rose to the defence of the Philadelphia plan when it was threatened in late 1969. In fact, the NAACP came out against the Philadelphia plan as “divisive.”<sup>40</sup> Nixon clearly worked hard to save the Philadelphia plan in 1969 from a congressional challenge and safeguarded affirmative action in the congressional battle over the Equal Employment Opportunity Act of 1972. But in the run-up to the 1972 election, Nixon campaigned *against* the quotas he had fought so hard to preserve. Understanding the Nixon civil rights agenda has been, as Skrentny observed, “an exercise in futility for

scholars of the American Presidency - as well as for insiders in the Nixon White House.’<sup>41</sup>

A hidden yet important aspect of affirmative action has been its role within an historical process whereby the American State has gained a remarkable amount of power over its citizens. It is interesting that little opposition to affirmative action – hostile in general to government interference in the lives of American citizens – approve of the notion that private employers should be free to set quotas (or to discriminate) if they like. Neither side of the debate appears primarily concerned with the issue of freedom from government interference. In the fight between Sean Thornton (John Wayne) and Red Will Danaher in the movie classic, *The Quiet Man*, neither of the fighters accomplishes much but an awful lot of scenery goes by as they fight. Those who see recent American history in left-right terms, as an eternal battle between liberal progressives and conservatives, miss the incredible distances both have covered towards what Hugh Davis Graham has called a “vast but quiet revolution in the nature of the American State itself.”<sup>42</sup> The American State has clearly progressed from its New Deal or perhaps post-war Keynesian role whereby it simply oiled the wheels of the capitalist engine. The State now regulates hiring, promotion and firing processes for the majority of employed Americans. An estimated three-quarters of Americans belong to “affected classes” who warrant preference under affirmative action plans.<sup>43</sup> Because the Equal Protection Clause of the Fourteenth amendment of the Constitution protects individuals from exclusion due to their race, the courts must constantly rule whether or not disputed programs serve a “compelling governmental interest” that justifies racial categories. In some ways, the

civil rights struggle has moved off the streets and into the courtroom. Real power has not so much been accrued by different interest groups as by the courts and the executive.<sup>44</sup>

The issue is also interesting in that the dominant pluralist vision of American political and policy history has foundered on affirmative action. No national civil rights group or other “interests” that stood to gain implemented or even lobbied for the Philadelphia plan. It was, as Skrentny has remarked, completely the product of a white male policy elite<sup>45</sup>; there was little public pressure for affirmative action from its beneficiaries nor anyone else. No political gains were made by the Nixon administration by implementing affirmative action. In fact, as Nixon observed just a few days after saving the Philadelphia plan from a congressional attack on it in 1969, “we gained little on the play.”<sup>46</sup> There was no bargaining and no compromises were reached. One single group dominated in making decisions that would result in affirmative action policies – the white male (Republican) elite. One of the most influential policy decisions in American history has never really been subject to a democratic decision by the American people. In virtually every poll taken, white Americans overwhelmingly rejected the idea of preferences for blacks and a sizeable minority of black Americans also rejects preferences.<sup>47</sup> Affirmative action programs have consistently either eluded or circumvented the democratic process. Instead of political gain, these policies offered a way to restore the legitimacy of government action on civil rights after the post-war appeals to white American conscience simply drew attention to the gap between the promise and the realisation of civil rights. Affirmative action policies regulated relations between the races that had previously been left within the private sphere. Nixon, though

his gut instinct went against further government intervention in the area of civil rights, understood that restoring legitimacy to government had to be prioritised.

Another connected facet of affirmative action is that it effectively depoliticised the issue of civil rights. The civil rights movement may have been a movement of “political rejuvenation or revitalization,” as Richard King points out, but its effects on the existing polity were profoundly destabilizing.<sup>48</sup> By forcing the issue of civil rights, the expectations of black Americans were raised and, when they were not met, black insurgency and ghetto riots ensued. White reaction to the issue also resulted in a crisis of authority for the status quo in the late 1960s. The Nixon administration spent much of its time devising ways to re-incorporate disparate strands of American society to ensure that they worked within the existing political structure. Affirmative action brought the unruly issue of civil rights firmly within the system, blunting the widespread questioning of existing authority, reducing a potentially explosive political question to an argument about how much, reducing a qualitative question to a quantitative argument. Though affirmative action has generated its own consequences and, as a controversy, is anything but dead, there is a certain stability to these discussions. The United States could once again appear to its citizens to be a quasi-pluralist democracy, whereby different interests compete against each other and the State exists primarily as an arbiter rather than a perceived barrier to social progress. Black Americans and other groups who felt they were excluded were brought into the system *through* affirmative action policies, while the white backlash was incorporated into Republican politics by (sometimes only apparent) *opposition* to them. Again, Glazer found that “the stability we see is not only one of exhaustion and equally matched forces; it is also one of institutionalizing the

acceptance of affirmative action as a legitimate norm by employers; even, grudgingly, by employees.”<sup>49</sup> The issue of race, so destructive to the fabric of American society in the past, has been contained within the issue of affirmative action. Though controversy remains, no alternative leadership or counter elite has emerged nationally and, despite efforts, no mass campaign has emerged.<sup>50</sup> Dye and Zeigler observed in 1970: “If American elites can help the blacks achieve economic equality, prevent further urban violence, and pacify the white masses, they will indeed have proved the viability of American democracy.”<sup>51</sup> That two of three of these tasks has been accomplished concurrent with the development of affirmative action is surely significant.

The points above – I hope – justify more analysis of this much talked-about issue. In building on some excellent histories of affirmative action as an evolving concept and set of policies, I hope to be able to contribute to an exciting and dynamic current that deserves further exploration. In that spirit, this study hopes to place the development of affirmative action – not simply as a series of programs but in the larger sense of a “system” sketched above – in historical context by examining the emergence and development of affirmative action largely within Nixon’s first term, 1969-1972. It will examine the introduction and rapid expansion of affirmative action programs in the context of the Nixon White House’s need to assert control over both a Congress and a bureaucracy hostile to many of its policy innovations.

In examining affirmative action, this thesis will concentrate on *elite* policymaking and responses to civil rights issues. In doing so, it will suggest that the historical impetus for affirmative action came more from the top than from pressure from civil rights groups. Undoubtedly, the civil rights movement created the civil rights

revolution in the 1960s that provoked a crisis of the elite. It is not the intention here to belittle the importance of the movement in influencing profoundly the history of the period and, in many ways, creating the need for affirmative action. The literature on the civil rights movement is voluminous and there is no need to repeat the story. But it must be stressed that affirmative action was an elite strategy to deal with civil rights and race relations problems. As Skrentny observed: “There was never any march on Washington for affirmative action, never any consistent pressing of politicians to acquiesce in a policy of racial hiring. ...The policy is largely the construction of white male elites who traditionally have dominated government and business.”<sup>52</sup>

One central question – why did Nixon, the conservative author of the “Southern strategy,”<sup>53</sup> a hyper-political operator whose feelings towards black Americans were ambivalent at best, implement a radical change affecting not only African-Americans but also women? – is the basis for this dissertation. There are, of course, different facets to the question. One important method of understanding the origins of affirmative action the importance of which will be demonstrated throughout this dissertation, is as policy history, as a result of administrative logic as well as in relation to various political and social trends occurring around these unfolding policies. A simple truth concerning affirmative action policies is that the Federal government could effectively enforce them at a local level by threatening contractors who failed to make sufficient progress toward specific goals and targets or by setting aside a segment of contracts to minority-owned firms. These goals and targets replaced the vagueness of many Great Society civil rights policies and civil rights policy no longer relied on voluntary activism on the part of companies, unions or the white population. It could be



enforced, unlike housing and education civil rights reform, fairly effectively at a local level.

We are, however, left with many questions. For instance, why wasn't affirmative action implemented earlier, given its effectiveness? And what precipitated its arrival at the end of the 1960s? As chapter 1 indicates, schemes very similar to affirmative action operated before WWII with few problems. Certainly, the broad strategy behind affirmative action today was understood throughout the post-war period. Chapter 1 evaluates the importance of the Myrdalian model of race relations and shows why it could not broach affirmative action in its modern sense. Chapter 2 details early government civil rights efforts, indicating that, although the affirmative action strategy (and even the term "affirmative action") was familiar to Truman and Eisenhower officials, they drew back from enforced quotas. Chapters 3 and 4 look at what was at base a political crisis resulting in the decline of the authority of liberal institutions, including liberal hopes for reforming the attitudes of white Americans. I will show that the post-war liberal attitude towards race – the basis of post-war government intervention in race relations – could only be maintained in an era characterised by a broad social and political consensus. In the last chapter of this section, I will discuss the crisis at another level, showing the relationship between these crises and the unfolding of affirmative action in terms of social theorist Jürgen Habermas's *Legitimation Crisis*.<sup>54</sup>

In the second section, I will examine the conscious responses by the Nixon administration to the various crises. Chapter 6 shows that the importance of the Philadelphia Plan was not for its programmatic or administrative precedent – for there is little indication that the Philadelphia Plan succeeded – but for the battle in Congress

surrounding it. Here Nixon's role in defending the Philadelphia Plan was crucial. Chapter 7 indicates that other policies implemented by Nixon at about the same time as the Philadelphia Plan were more important in the programmatic development of affirmative action. Chapter 8 evaluates a shift of emphasis in civil rights policy 1970 effected by Nixon himself in terms of the direction meant that affirmative action policy took away from the ghettos and towards the creation of a more stable black middle-class, a different emphasis than Great Society policies. This was no retreat from affirmative action, however. Not only did Nixon refuse to disavow this affirmative action plan, the White House defended affirmative action programs for the second time against an attempt to make them illegal which was included in the Democratic-sponsored Equal Employment Opportunities Bill put forward in the fall of 1971. Finally, Chapter 9 deals with the seemingly impenetrable private Nixon's views on race and civil rights. Considered by many to be a racial liberal in the 1950s, Nixon was ambivalent when in the White House about whether blacks were capable of being equal. There is evidence that he doubted they were. Yet, he kept the door open. Nixon's views on race were not, however, atypical of his generation. Far from the moral cipher that many historians consider him to have been, he strongly believed in what Gary Wills referred to as the "right to earn,"<sup>55</sup> a version of the Weberian Protestant work ethic promoting rewards to anyone willing to work hard, and was anxious to extend this right to African-Americans. That he put this into practice in the form of the Philadelphia Plan indicates a certain commitment to this ideal. Nor, if we analyse Nixon's support for affirmative action in this way, is there any clash with his attack on quotas in the run-up to the 1972 election.

In the final section, the last pieces of the puzzle are assembled. Here, I examine changes in the American economy, the rise of a popular consciousness of limits, and the influential philosophy of John Rawls. These trends ensured that affirmative action policies were the policies of choice during the 1970s but also ensured that an obscure policy became a huge political issue. The key change was the rising importance of the realm of distribution as opposed to that of production. Affirmative action became viable in an era where private companies grew increasingly reliant on government contracts. It became effective as an ethical method of distribution of social goods in the absence of the discipline of the market. It also became contentious when it became a zero-sum game – when, in the perceptions of white American males especially, finite social goods were being divided unfairly.

Chapter 10 deals with the gap that exists between the arrival of affirmative action *policies* and the emergence of affirmative action as an *issue*. There was virtually no opposition to affirmative action until, on the pages of *Commentary* in late 1971 and 1972, writers started attacking “quotas” because of the effect of “reverse discrimination.” It is doubtful that very many Americans were made aware of this set of policies until the Supreme Court ruled on the *Bakke* case in 1978. Chapter 11 explores the shifts in the justifications for affirmative action policies after the threat of riots receded and after the extension of categories of minorities and the addition of women as an affected class. John Rawls’ *A Theory of Justice* and the Club of Rome’s *Limits to Growth* are analysed in their contribution to a complex new set of justifications for affirmative action in the 1970s.

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<sup>1</sup> Gabriel Chin, in the introduction to *Affirmative action before constitutional law, 1964-1977*, noticed that Stephen King, in his best seller, *Christine*, told of a couple who “could quote you chapter and verse of the A[l]lan Bakke case until you fell asleep.” Chin comments that with King’s “ability to invent this kind of chilling tale, it is no wonder that King is known as the master of horror.” Gabriel Chin, “Series Introduction,” *Affirmative Action Before Constitutional Law, 1964-1977* (London: Garland Publishing, Inc., 1998), ix.

<sup>2</sup> Unfortunately, even the concept “non-white” is problematic. According to John David Skrentny, Italians, who are hardly considered non-white today, have been beneficiaries of affirmative action policies in New York. See Skrentny, “Affirmative Action: Some Advice for the Punters,” *American Behavioural Scientist*, Vol. 41, No. 7, (April 1998), 877-885.

<sup>3</sup> The definition corresponds to the period in which it is used. For the purposes of this study, the term affirmative action will refer to the definition relevant to the particular period being discussed.

<sup>4</sup> <http://www.whitehouse.gov/WH/EOP/OP/html/aa/aa-index.html> (7/21/99).

<sup>5</sup> *Ibid.*

<sup>6</sup> Section 706 (g) of Title VII provides that when a Court finds that an employer is engaging in an unlawful employment practice, it should “order such affirmative action as may be appropriate.” See Appendix I.

<sup>7</sup> Richard Nathan, *Jobs and Civil Rights: The Role of the Federal Government in Promoting Equal Opportunities in Employment and Training* (United States Commission on Civil Rights Clearinghouse Publication No. 16, April 1969), 93. See also John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (London: University of Chicago Press, 1996), 135.

<sup>8</sup> “On Quotas,” editorial, *New Republic*, (October 21 1972), 9-10.

<sup>9</sup> Hugh Davis Graham, “Unintended Consequences: The convergence of affirmative action and immigration policy,” *The American Behavioural Scientist* Vol. 41, No. 7 (April 1998), 898-912. Some who advocate affirmative action would also like to include redrawing election districts in order to increase the number of minority representatives likely to be elected. See, for instance, Erwin Chereminsky, “Making Sense of the Affirmative Action Debate,” in John Higham, ed., *Civil Rights and Social Wrongs: Black-White Relations Since World War II* (University Park, PA: The Pennsylvania State University Press, 1997), 90-106. Recent Supreme Court decisions such as *Shaw v. Reno* (1993) and *Miller v. Johnson* (1995) have been hostile to redrawing election districts to increase minority representation. The courts were careful, however, to leave the door open to future attempts by saying that this procedure might be tolerated if “strict scrutiny” were met.

<sup>10</sup> Those within the civil rights movement who had advocated some sort of affirmative action normally did so by citing the need for reparations for the years of black oppression. See Charles Silberman, “The Businessman and the Negro,” *Fortune*, (September 1963), 97-99, 184-194. Former Student Non-Violent Coordinating Committee (SNCC) chairman James Forman demanded in 1969 \$500 million in “reparations” from white churches. For a hostile but detailed account of Foreman’s foray into white churches and synagogues, see Lionel Lokos, *The New Racism: Reverse Discrimination in America* (New Rochelle, NY: Arlington House, 1971), 333-335.

<sup>11</sup> In *Wygant v. Jackson Board of Education* 476 U.S. 267 (1986), Justice Lewis Powell declared that the role model theory contradicted the real reason for being of affirmative action, past discrimination. See Chereminsky, “Making Sense of the Affirmative action Debate,” 92-93.

<sup>12</sup> In the Bakke case, only three out of twenty-five *amicus curiae* used the term “diversity” as a reason for continuing affirmative action cases. See D. H. Myers, “Bakke and DeFunis Cases Still Shadow Campuses: ‘Diversity’ Is Under Increased Attack,” c1992 <http://www.best.com/%7Edhm/commentaries/diversity.html> (7/20/99).

<sup>13</sup> Cited in Chereminsky, “Making Sense of Affirmative Action,” 90-91. It should be noted that the Supreme Court ruling in *Adarand v. Peña* again emphasised that strict scrutiny should be used in reviewing federal affirmative action efforts. The test is whether the government’s action is necessary to achieve a compelling government purpose. “Death by judges?: Affirmative action.” *The Economist*, (17 June 1995). See the archive section of *The Economist*’s web-site, [www.economist.com](http://www.economist.com) (6/24/99).

<sup>14</sup> R. Roosevelt Thomas, “From Affirmative Action to Affirming Diversity,” *Harvard Business Review* 90, No. 2 (March-April, 1990), 107-117. Erin Kelley and Frank Dobbin, “How Affirmative Action Became Diversity Management,” *American Behavioural Scientist*, Vol. 41, No. 7 (April 1998), 960-983.

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<sup>15</sup> Cited in Chin, ed., *Affirmative action before Constitutional Law*, xvi.

<sup>16</sup> Michael W. Combs and John Gruhl use the following definition: "By affirmative action, we refer to a specific and result-oriented procedures that are utilized to insure that non-whites and women are not disadvantaged in efforts to secure employment." Combs and Gruhl, eds., *Affirmative Action: Theory, Analysis, And Prospects* (Jefferson, NC: McFarland & Company, Inc., 1986). John Skrentny in *The Ironies of Affirmative Action* notes that: "In this study, affirmative action will be recognized as a model more or less advocated in public or official statements or institutionalized in particular practices or laws, on the basis of the extent to which the following unit ideas are present; (1) a requirement that employers see in their everyday hiring and promoting group difference and specifically race as real (rather than unreal or irrelevant), (2) an emphasis on counting anonymous minorities in the workforce (rather than treating each individual as an individual), (3) a de-emphasis rather than an emphasis on discriminatory or racist intent and on finding individual victims of discrimination, (4) de-emphasis or re-evaluation rather than emphasis or acceptance of previously accepted standards of merit (usually with a critique of the traditional concept of merit in employment as "white" or "middle class"), and (5) an overriding concern with representation, utilization, or employment of minorities, rather than stopping harmful "bigoted" acts of discrimination." However, Skrentny uses a more inclusive definition extending to the award of contracts and to university admissions in more recent articles. See "Some Advice for the Pundits."

<sup>17</sup> Anonymous memo to Mr. Terrence M. Scanlon, Office of Minority Business dated 15 December 1969, Equal Employment Opportunities Commission (EEOC) – 1970 [2 of 2][CFOA 7730], Garment: Alpha Subject Files, Box 35, WHSF: SMOF: Garment, NPMP.

<sup>18</sup> Graham, "Unintended Consequences," 905.

<sup>19</sup> Mark Krikorian, who was press secretary for the Federation of American Immigration Reform (FAIR), has been amongst the most strident of those calling for an end to affirmative action for immigrants. See "Affirmative action and immigration," Nicolaus Mills, ed., *Debating Affirmative Action: Race, Gender, Ethnicity and the Politics of Inclusion* (New York: Delta, 1994), 300-303. See also Graham, "Unintended Consequences."

<sup>20</sup> The best explication of this argument is contained in Harold Cruse, *Plural But Equal: A Critical Study of Blacks and Minorities and America's Plural Society* (New York: William Morrow and Co., Inc., 1987). John Fiske contends that affirmative action policies have benefited white women at the expense of African-American Males. See the chapter entitled "Race and Gender in U.S. Politics" (99-128) in *Media Matters: Everyday Culture and Political Change*, (Minneapolis, MN: University of Minnesota Press, 1994). Hanes Walton and, later, Robert C. Smith, while not specifying women, also highlight the problems for blacks if other groups are included in affirmative action policies. See Hanes Walton, *When the Marching Stopped: The Politics of Civil Rights Regulatory Agencies* (New York: SUNY Press, 1988) and Robert C. Smith, *We Have No Leaders: African-Americans in the Post-Civil Rights Era* (New York: SUNY Press, 1996).

<sup>21</sup> Benjamin L. Hooks, "Self-Help" just won't do it all," Nicolaus Mills, *Debating Affirmative Action*, 304-308, 305.

<sup>22</sup> Bill Clinton and Al Gore, *Putting People First: How We Can All Change America* (New York: Times Books, 1992). The only mention of affirmative action policies in this book is "oppose quotas" on page 64.

<sup>23</sup> *Affirmative Action Review – Report to the President*, 1995. Full text version can be found at (<http://www.whitehouse.gov/WH/EOP/OP/html/aa/aa-index.html>).

<sup>24</sup> See "On Quotas and Affirmative Action," a speech given by Leonard Garment October 6 1972, On Quotas and Affirmative Action Oct. 6 1972 [2], Speeches and Meetings, Box 30, WHCF, SMOF: Garment, NPMP.

<sup>25</sup> Barbara R. Bergmann, *In Defense of Affirmative Action* (New York: Basic Books, 1996), 31, 13.

<sup>26</sup> *University Of California Regents v. Bakke*, 438 U.S. 265 (1978).

<sup>27</sup> For instance, Garment was forced to correct other members of staff who referred to the quotas of the Philadelphia plan. See Memo for Ken Cole from Garment, May 22 1970 where Garment has to remind White House aide Ken Cole that "the term 'quotas' used in column two relating to the Philadelphia Plan should be changed to 'goals.'" (The memo can be found in the folder marked Civil Rights Accomplishments [1 of 2][CFOA 907], Box 57, WHSF: SMOF: Garment, NPMP.) Ehrlichman also notes casually that "quotas [have been] est[ab]lished] regarding the small Business Administration's 8(a) program

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in 1969. See Handwritten Notes of a meeting, no date (probably September 1969), Files of John Ehrlichman re: EEOC # 379 [CFOA 7730] Box 86, WHSF: SMOF: Garment, NPMP. In fact, the term “quota” remained shorthand for “goals and timetables” within the press at the time. For instance, the *New York Times* on February 15 1970 reported that “[Dr. James E.] Allen [the Commissioner of Education] Bids School Aides Around Country Back Job Quotas.” Allen had been careful not to use the phrase, however.

<sup>28</sup> See the Introduction to Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (London: Harvard University Press, 1987), xvi. John Skrentny makes a similar observation in his book, *The Ironies of Affirmative Action*, 6-7.

<sup>29</sup> Kelley and Dobbin describe this process fully in “How Affirmative Action became Diversity Management.”

<sup>30</sup> Dave Leshner, “State Defends 2 Affirmative Action Efforts in Court: Democrats file papers to support lottery and treasurer programs that encourage contracts with women and minorities,” *Los Angeles Times*, Monday, July 19, 1999 (available on [www.latimes.com/archives](http://www.latimes.com/archives)).

<sup>31</sup> Glazer, Introduction to *Affirmative Discrimination* (1987), xvii.

<sup>32</sup> See Kelley and Dobbin, “How Affirmative Action Became Diversity Management.” They write: “Over the past quarter of a century, efforts to integrate the workforce were transformed, in management rhetoric, from an onerous requirement of federal law to a valuable means to increase organizational effectiveness.” (961).

<sup>33</sup> A 1985 study of Fortune 500 companies, prompted by proposed changes to EO11246 (see appendixes), found that 95 percent intended to “continue to use numerical objectives to track the progress of women and minorities,” regardless of government compliance. Cited in Kelley and Dobbin, “How Affirmative Action Became Diversity Management,” 969.

<sup>34</sup> “California: Not over till its over,” *Economist*, (November 16 1996 ). Available on archives section of [www.economist.com](http://www.economist.com).

<sup>35</sup> “Over the Rainbow,” *Economist*, (November 22 1997) ([www.economist.com](http://www.economist.com)).

<sup>36</sup> See David Bamber, “Straw to set ethnic quota for every police force,” *Sunday Telegraph*, Sunday 11 April 1999, and David Millward, “Police recruitment drive for gay officers,” *Daily Telegraph*, Thursday 21 November 1996. (see archives section of [www.telegraph.co.uk](http://www.telegraph.co.uk)) The latter initiative, by South Yorkshire Police, was intended to increase the proportion of homosexuals within its ranks from its current level of “about three to five per cent.” Steven M. Teles [“Why is there no Affirmative Action in Britain?,” *American Behavioural Scientist*, Vol. 41, No. 7, (April 1998), 1004-1026] has argued that there is no affirmative action in Britain because of the lack of available statistics, the distaste expressed by many minorities towards such policies and because of a more positive attitude towards race relations. While there is undoubtedly some truth to Teles’ points, there are clearly some affirmative action-like measures that run counter, at least in spirit, to the 1976 Race Relations Act, as the above headlines indicate. There is, however, no equivalent controversy about these measures in Britain.

<sup>37</sup> See Sunita Parikh, *The Politics of Preference: Democratic Institutions and Affirmative Action in the United States and India* (Ann Arbor, MI: The University of Michigan Press, 1997).

<sup>38</sup> For an account of demands for quotas from civil rights groups in the 1930s, 1940s and 1950s, see Paul D. Moreno, *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America 1933-1972* (London: Louisiana State University Press, 1997).

<sup>39</sup> William H Chafe, *The Unfinished Journey: America Since World War II* (New York: Oxford University Press, 1986), 163.

<sup>40</sup> See, for instance the editorial in *The Crisis*, (December 21 1969), 8-9.

<sup>41</sup> Skrentny, *The Ironies of Affirmative Action*, 178.

<sup>42</sup> Graham, *Civil Rights Era*, 462.

<sup>43</sup> Graham, *Civil Rights Era*, 412.

<sup>44</sup> See *University Of California Regents v. Bakke*, 438 U.S. 265 (1978). The court also invoked strict scrutiny over racial categories in decisions dating back to *Korematsu v. US* (1944).

<sup>45</sup> Skrentny, *The Ironies of Affirmative Action*, 5.

<sup>46</sup> Annotated News Summary, January 13 1970, News Summaries - January 1970, Box 31, President’s Office Files (POF): Annotated News Summaries, NPMP. See also Graham, *Civil Rights Era*, 340.

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<sup>47</sup> See Howard Schuman, Charlotte Steeh, Lawrence Bobo and Maria Krysan, *Racial Attitudes in America: Trends and Interpretations* (London: Harvard University Press, 1997), 175-6, 268-269. See also polls conducted in 1967: In answer to the question 'Should government agencies get tougher in requiring companies to hire Negroes?' 69% thought enough was being done (64% in May 1964), 13% said get tougher (15% in May 1964) and 18% said no opinion (21% in May 1964). About 1 in 5 said that agencies should get tougher with unions, unchanged, virtually, since 1964. Of course, there were huge differences between blacks and whites on these issues. Public Opinion in Late 1967 - Opinion Research Corporation, Box 26, Records of the Republican National Committee (hereafter RNC records) transferred to the Office of Presidential Libraries on June 30, 1978, NARA, Washington, DC.

<sup>48</sup> Richard H. King, *Civil Rights and the Idea of Freedom* (Oxford: Oxford University Press, 1992), 202.

<sup>49</sup> Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (London: Harvard University Press, 1987), xvi.

<sup>50</sup> For a discussion of "counter elites," see Thomas R. Dye and L. Harmon Zeigler, *The Irony of Democracy: An Uncommon Introduction to American Politics* (Belmont, CA: Wadsworth Publishing Company, Inc., 1970), 139, 189-90. Jesse Jackson's promise to lead a civil rights-style struggle against 209 did not happen. Jackson's recent contribution to upholding affirmative action consists of activities like raising hundreds of thousands of dollars to pay the Piscataway school board in New Jersey in order to keep an affirmative action case *out* of the Supreme Court (and, thus, the limelight) for fear of losing. See "Race and politics. A dialogue of the deaf," *The Economist*, 29 November 1997 ([www.economist.com](http://www.economist.com)). The campaign for Proposition 209, it is true, threw up some leadership that was clearly outside the existing power structure. For an excellent analysis of the campaign, the bewilderment of its leaders in the face of the existing political machinery within both parties, and the inability of either political party to make effective use of the issue, see Lydia Chávez, *The Color Bind: California's Battle to End Affirmative Action* (Berkeley, CA: The University of California Press, 1998). However, after the proposition passed, the political leader most associated with support for the proposition, Pete Wilson, lost his office to Democrat Gray Davis, who – as this is written – has remained silent on the issue. In other words, the issue was effectively sidelined from even California politics.

<sup>51</sup> Dye and Zeigler, *The Irony of Democracy*, 320/321.

<sup>52</sup> Skrentny, *The Ironies of Affirmative Action*, 5.

<sup>53</sup> The "Southern strategy" refers to the alleged plan of the Nixon election team to attract Southern white votes by promising to slow down school desegregation in the South. See Reg Murphy, and Hal Gulliver, *The Southern Strategy* (New York: Scribner, 1971) and Harry S. Dent, *The Prodigal South Returns to Power* (New York: John Wiley and Sons, 1978).

<sup>54</sup> Jürgen Habermas, translated by Thomas McCarthy, *Legitimation Crisis* (London: Heinemann Educational, 1976).

<sup>55</sup> "Nixon believes in civil rights, only he believes a man's first right is the right to earn." Garry Wills, *Nixon Agonistes: The Crisis of the Self Made Man* (Boston: Houghton Mifflin Company, 1970), 582.

## Section 1

# FROM MYRDAL TO THE KERNER COMMISSION: THE FALL OF THE LIBERAL HOUSE OF CARDS

Time, events, or the unaided individual action of the mind will sometimes undermine or destroy an opinion, without any outward sign of the change. It has not been openly assailed, no conspiracy has been formed to make war upon it, but its followers one by one noiselessly secede, day by day a few of them abandon it, until at last it is only professed by a minority... They are themselves caught unaware that a great revolution has actually been affected... The majority has ceased to believe what they believed before, but they still effect to believe, and this empty phantom of public opinion is strong enough to chill innovators and keep them silent and at a respectful distance. (Alexis de Tocqueville, *Democracy in America*).



## Chapter 1

### THE MYRDALIAN PARADIGM

In exploring this question, it becomes apparent that a set of values – existing in the 1940s, 1950s, and early 1960s but no longer in existence by the early 1970s – regarded government enforced quotas as taboo. It is answered indirectly for the most part by the existing scholarship. Policy historian Hugh Davis Graham identifies three “new and institutionally distinct” streams of thought as being responsible for the change in meaning and raised profile of affirmative action occurring in the 1970s: 1., Bureaucratic logic of “cliente capture.” 2., “(t)heoreticians of affirmative action.” and 3., judicial logic following the courts’ switch to demanding the “undoing of the effects of past discrimination.”<sup>1</sup> Unfortunately, the “theoreticians of affirmative action” that Graham claims contributed to the acceptance of affirmative action policy simply did not exist before the Nixon presidency. In a footnote he lists the Ford and Rockefeller foundations, the American Civil Liberties Union, law schools and others but fails to specify which articles or books provided a “theory of affirmative action.” The first examination of affirmative action as a comprehensive theory can be seen in a critical article by Daniel Bell reviewing the 1970 Civil Rights Commission (CRC) report, a year after the implementation of the Philadelphia plan. Even then, Bell simply pointed out that the definition of discrimination used by the CRC – failing to achieve results – contradicted the earlier definition whereby an individual consciously refused to employ minorities.<sup>2</sup> Not until Nathan Glazer published *Affirmative Discrimination* in 1975 (made up of articles published earlier) was there a book-length critique of affirmative action, let

alone an extensive justificatory tract.<sup>3</sup> That such an important policy change should be implemented *before* any treatise describing it appeared calls into question Graham's formulation of affirmative action as a conscious, coherent policy. It is no doubt more accurate to say, as Nixon speechwriter William Safire did, of affirmative action: "Strange, fitting a philosophy to the set of deeds, but sometimes that is what must be done."<sup>4</sup> The "clientele capture" formulation is also problematic. That the clientele – the civil rights movement – became incorporated into the Federal bureaucracy need not be contested.<sup>5</sup> What needs to be explained, however, is why, if affirmative action was the result of civil rights activists moving into the halls of government, very few calls for affirmative action programs were heard prior to their "capture." Apart from a small discussion prior to the 1964 Civil Rights Act during which civil rights leaders made clear their opposition to quotas, very little was heard about the issue at all.<sup>6</sup> Moreover, as will be demonstrated later, key civil rights movement figures ignored or opposed the Philadelphia plan when it introduced an affirmative action policy in the construction industry in 1969.

Graham's contention that "judicial logic" moved towards demands for goals and timetables is undeniable. There is much to the idea that frustration with the inability to enforce aspects of the 1964 Civil Rights Act led to demands for demonstrable equal results. A convincing explanation of why piecemeal judicial decisions converged with Executive actions to create an entire system based on affirmative action logic at the time that it did, however, is missing from Graham's analysis. Judicial demands for percentages of minorities hired within particular industries and organizations were hardly new, as will be demonstrated below. Why did a system of affirmative action in which the

focus of civil rights and race relations not take place soon after the 1964 Civil Rights Act became law? In late 1965 at the White House Conference on Civil Rights the few demands upon which the fragmenting civil rights movement could agree focused on the lack of enforcement of existing laws.<sup>7</sup> What barriers to a system of affirmative action existed in 1965 that no longer existed ten years later?

A useful insight appears in a comment in the conclusions of *The Civil Rights Era*. Graham notes the occurrence of a “shift of civil rights policy appears to have been the unwitting cutting edge of a vast but quiet revolution in the nature of the American State itself.”<sup>8</sup> Writing in the *Journal of Policy History* in 1998, Graham expands upon this thesis by including affirmative action as one of the “subsets” of a swathe of social regulation sextupling the pages of the *Federal Register* in the 1970s.<sup>9</sup> The idea of affirmative action as regulation undoubtedly captures an aspect of it that the left/right discussion misses.

In terms of understanding the previous period of history, in which affirmative action was not even considered an option, something must have existed which precluded quota-based policies. Whatever it was, it was disappearing or at least in crisis by the time affirmative action policies came to dominate the policy environment. John David Skrentny devotes an entire section of his book, *The Ironies of Affirmative Action*, to this very question.<sup>10</sup> He notes that in 1964 “the interest of the mainstream civil rights groups and liberals were peculiarly limited. Presumably, racial preference was in their interest then, as it is presumably in their interest now. Why not demand it in 1964, go for all one can get, and compromise later if necessary?” His answer is simple: “Anything beyond color blindness had a strange, taboo-like quality. Advocacy of racial preference

was one of those ‘third rails’ of American politics: Touch it and you die.”<sup>11</sup> Skrentny’s study concentrates on reconstructing the “historical and cultural context of policy elites.” Three chapters address the problem of “Understanding Resistance to Affirmative Action.” Skrentny shows the historical and ideological barriers to affirmative action and includes a discussion on what he calls “acceptable preference.” Echoing complaints first heard from the National Urban League,<sup>12</sup> Skrentny compares the preference shown to veterans after the World Wars with that of affirmative action. The comparative structure is flimsy in that preferences for soldiers could be seen as rewards for service rather than preferential treatment.<sup>13</sup> As will be shown in this chapter, Paul D. Moreno makes the same point – that the preferences in affirmative action were hardly unprecedented – more effectively by showing that employment preferences for African-Americans, let alone preferential treatment for veterans or mothers or children of alumni, had been instituted in the past.

Skrentny’s “color-blind” model of American society is more compelling, particularly in his explication of affirmative action and color-blindness as systems of thought that dominated different periods of history. He sees affirmative action not as a specific set of policies but as a model or “policy paradigm.”<sup>14</sup> He compares it with what he sees as the previous policy paradigm, the color-blind model. This usefully divides the piecemeal decisions from the arrival of affirmative action as a *system*. However, in order to understand why affirmative action could not be implemented before Nixon took the reins of the presidency, the “color-blind” paradigm must be investigated.

One point that has become clear (and will be discussed below) is that, before WWII, quota-based policies existed, implemented by the Federal Government and

private companies. This move to create quotas created very little comment at the time. Besides this, official quotas dictated the “racial” nature of immigration to the United States after 1924.<sup>15</sup> Presumably the color-blind paradigm simply did not operate before WWII. When it did operate, how far did it affect the United States? Color-blindness, though it was official policy for much of the post-war period, did not extend to all American communities at this stage, as Arnold Hirsch and Thomas Sugrue have pointed out.<sup>16</sup> Another possible problem with the “color-blind” model is that much of the color-blind rhetoric still holds true during the “affirmative action era.” Justice Harry Blackmun, dissenting in the *Bakke* case, stated that America was going through a regrettable but necessary phase of “transitional inequality” that would end “within a decade at most.”<sup>17</sup> Many other supporters of affirmative action today see their ultimate goal as a color-blind society but suppose that color-conscious policies are needed to achieve that goal.<sup>18</sup> Though there is undoubtedly much insight to be gained by arguing that a “color-blind” society prevented affirmative action from operating, we must look more closely at how this color-blind ethos operated.<sup>19</sup>

Skrentny is right to point to the importance of whatever prevented affirmative action – more effective, surely, than its policy predecessors – from becoming the general approach before Nixon implemented the Philadelphia Plan in 1969. This chapter will be, in part, an attempt to build upon Skrentny’s paradigmatic approach to affirmative action, to sketch some of the relevant aspects of the post-war liberal world-view in order to understand why it remained resistant to initiating a quota-based system and to understand why a quota-based system was adopted less than a decade after it had been condemned all around. Regarding the first part of the question, several elements of

post-war liberal ideology stand out as important in analysing why a quota-based system could not be considered. First, the problem began to be analysed after WWII as one of outdated and irrational prejudice in American whites. The solution, it was felt, was to educate whites away from their prejudices and to show them that there was no economic rationale to racism. Quotas were not seen as helpful in achieving this aim as they might antagonise white workers. Second, *consensus* politics were the rule during this period. The issue threatened the New Deal coalition. Again, quotas might jeopardise the consensus needed to resolve the problem. The great hope of post-war liberalism was that American democratic institutions,<sup>20</sup> including education, business, political parties, and trade unions, would oversee the eradication of racial discrimination. Through these institutions, the irrational mobs that were evident in Nazi Germany and the Soviet Union might be made more rational, more democratic and less irrationally racist. Any race relations policy that undermined these institutions was, at a time of Cold War tension, not simply counterproductive but hostile to American democracy, unAmerican. Only when, at the end of the 1960s, these institutions were seen to be bankrupt could tentative moves towards quota-based solutions be considered. Last, post-war liberalism saw quotas as unnecessary in a period characterised by belief in constant economic growth and a trend toward greater economic equality. The class-based economic inequalities that had resulted in so much tension before WWII appeared to have been overcome successfully with economic expansion; surely, liberals reasoned, any irrational race-based divisions would soon be transcended as life for all Americans became materially better. There was simply no room in an expanding economy for irrational prejudices.

Recently, Thomas Sugrue has written about the history of affirmative action: “The most influential arguments (both Left and Right) about affirmative action rest on two assumptions. First affirmative action represented a radical departure from previous public policies to address racial inequality. Second, the policy of racial preferences destroyed a liberal consensus that dominated American politics since the New Deal.” Both of these perspectives he calls “fundamentally ahistorical.”<sup>21</sup> Sugrue is half-right in his condemnation. First, as this chapter will show, quota-based affirmative action policies were no new invention in 1969 when the Philadelphia plan was initiated. But the context within which this old and somewhat obvious policy idea was initiated was very different. Second, this chapter will show that, in fact, a liberal consensus was destroyed in the second half of the 1960s, though not by affirmative action policies. Instead, this consensus self-destructed because of the destabilising effect of the issue of race within liberalism and the collapse of agreement on the desirability of racial progress within Democratic constituencies. Ironically, as we shall see, affirmative action has been important in limiting the damage that the issue of race inflicts upon American stability.<sup>22</sup>

## The Background to Post-war Liberalism in the US

In order to understand why affirmative action in its modern sense appeared when it did, it is necessary to analyse the post-war period. Only then can we understand what specifically precluded quota-based strategies for nearly a quarter of a century. In fact, the way race was understood was being revolutionised after the war. Racial divisions acceptable before the war were essentially redefined as problematic. In light of

the Nazi experience, psychologists were enlisted to explain what appeared to leaders to be the bewildering motivations of men and women who became committed Nazis or Communists.<sup>23</sup>

Gaetano Mosca observed that ruling classes vary in respect to the number and grade of social forces they control, tolerate, stimulate or create. The internal stability of a regime can be measured by the ratio between the number and strength of the social forces that it controls, conciliates or represents, and the number and strength of the social forces it fails to represent and oppose it.<sup>24</sup> In these terms, the ruling class in the United States in the post-war years enjoyed power almost unique in history. As Godfrey Hodgson observed, liberalism became not simply the property of liberals but a *consensus* formed when most conservatives accepted the Rooseveltian economic and domestic policies and liberals adopted conservative anti-communism. Liberal ideology was not restricted to intellectuals. Bankers, industrialists, clergymen, and even military men believed and actively propagated its principles. Only the extreme of left and right resisted these principles. The consensus built in the United States at this time was perhaps unprecedented in the history of any nation yet seen.<sup>25</sup>

The United States emerged from the war with an economy making up over 40 percent of the world's Gross Domestic Product.<sup>26</sup> The problems that American capitalism had experienced in the 1930s appeared to have been overcome during the war, which had created a full employment economy. Inadequate production was a problem of the past; inadequate consumption, after the war, appeared to be a more pressing problem. The New Deal left in place structures providing social security and to settle labor troubles that remained but, on the whole, the massive growth of the American economy seemed to



provide a solution to any residual labor problems.<sup>27</sup> Optimism about the capacity of the United States to create further growth was high.

However, American liberal rulers also had reason to be underconfident in their authority to rule. As Arthur Schlesinger, Jr., observed, liberalism combined a “certain operational optimism with a certain historical and philosophical pessimism.”<sup>28</sup> Too many previously-held assumptions had been exploded by depression and war to make liberals entirely comfortable with their own worldview. “Free society has failed,” Schlesinger lamented. “Western man in the middle of the twentieth century is tense, uncertain, adrift.”<sup>29</sup> Liberals like Schlesinger had to create a tentative path between unfettered capitalism, widely associated with war and depression, and the socialism of the Soviet Union. Whereas certain problems within American society such as class divisions, liberals felt, had been at least partially resolved, war had cast doubts on the human prospect. Reinhold Niebuhr, an influential thinker during this period, expressed this pessimism in 1944: “Man’s capacity for justice makes democracy possible”, Niebuhr concluded, “but man’s inclination to injustice makes democracy necessary.” This democracy, he felt, had a certain tension between “essential freedom” – “the capacity for indeterminate transcendence over the processes and limitations of nature” and the “necessity for order in human communities.”<sup>30</sup>

Democracy – as defined by postwar liberals – did not necessarily entail giving power directly to the electorate. In terms of political style, these liberals followed the political advice of Edmund Burke: that a representative of the people is elected not to exercise their judgement but *his* judgement on the issues. The job of political leaders was to be elected but to manipulate local interests in the greater interest of the nation. Richard

Neustadt, who published an influential treatise entitled *Presidential Power* in 1961, advocated that a President should use every conceivable political technique to manipulate existing interests in achieving his political, social, and economic goals. A liberal President, he wrote, has to manipulate against the powers that be. Liberal hero John F. Kennedy translated Neustadt's somewhat subversive attitude toward the democratic process thus in 1962: "The fact of the matter is that most of the problems, or at least many of them that we now face, are technical problems, are administrative problems. They are very sophisticated judgements which do not lend themselves to the great work of 'passionate movements' which have stirred this country so often in the past. Now they deal with questions that are beyond the understanding of most men."<sup>31</sup>

The question of race became central to liberal critiques of American democracy. Polls undertaken had showed that most Americans had no idea why they were fighting the war. "Among the most glaring examples of how depraved public opinion could actually be, and therefore how much in need of expert management, was 'intergroup conflict.'"<sup>32</sup> Instead of a political understanding of problems of race that had been prevalent before the war (which had been influenced by Communists and which they continued to push propagandistically after the war), the problem of racism was increasingly seen in psychological terms or moral terms.<sup>33</sup> The significance for quota-based policies is that they threatened to exacerbate "intergroup conflict." If the problems were psychological or moral, the answers would lie in these directions also, rather than in administrative measures.

## Liberalism and quotas

In response to the crisis of the depression, the New Deal set up various agencies to manage conflicts between labor and management that would later be inherited by those attempting to reduce racial conflict. Some of the legislation predated the New Deal but came to be associated with it, such as the Davis-Bacon Act of 1931 that regulated wages paid by federal contractors. When first used in the 1930s, the phrase “affirmative action” was connected with regulatory government action. C.B. Sudborough used the phrase in 1932 in a plea that motor vehicles were regulated, using the subtitle “Why the national welfare requires affirmative action.”<sup>34</sup> The phrase was also used in a sense much more similar to its meaning today in the 1935 National Labor Relations (or Wagner Act) required employers discriminating against union members to stop discriminating and to take “*affirmative action*” to place the victims where they would have been without the discrimination.<sup>35</sup>

Quotas, at least quotas of minority members within government employment schemes, also made their debut during the 1930s both in the private and public spheres. Yet the idea of quotas to overcome the prejudice that black Americans experienced dated back at least to Reconstruction. The Freedmen’s Bureau established benign racial classifications in order to combat prejudice against blacks.<sup>36</sup> In 1871 the black leader Martin Delaney argued that the way to counter discrimination was to establish quotas for blacks.<sup>37</sup> The Ford Motor Company had a policy in the early 1930s stating that “Negroes should make up the same proportion of the workers as corresponded to their proportion in the population of Detroit.”<sup>38</sup> Nor was the imposition of quotas by the Federal Government unprecedented. A quota program operated within

the Public Works Administration (PWA). Secretary of Labor Harold Ickes issued an order prohibiting discrimination based on race or religion in all PWA projects on September 1 1933. In 1934 Isador Lubin of the Bureau of Labor Statistics disclosed a confidential plan by which the Labor Department would negotiate for projects that would use 50 percent Negro labor. Clark Foreman, also of the Bureau of Labor, suggested basing the proportion of Negroes in each job category upon the occupational census of 1930. The PWA put Foreman's plan into effect. No quotas were ever devised for other racial or religious groups. Ickes sent a message to the NAACP's 1935 annual conference explaining the program. The contract for the first federal housing project, in Atlanta, specified that 12 percent of the skilled labor payroll must go to Negro employees.<sup>39</sup> Moreno sees this action partly as a response to the Davis-Bacon Act of 1931 which required paying "prevailing wage rates," thus reducing migrant non-union (often black) employment. In other words, they may have been quotas to prevent too much cheap black labor. If this is true, the NAACP raised no objections to the PWA quotas. In general, there was little objection in principle to the PWA experiments. They were successfully instituted in most cases, and met no legal challenge.<sup>40</sup>

These few instances of the imposition of quotas did not undermine New Deal liberalism, as Alan Brinkley, amongst others, has termed it.<sup>41</sup> In response to a perceived racial crisis, the 1924 National Origins Act established national quotas along racial and ethnic lines, determining the (greatly reduced) influx of immigrants by the proportion of racial and ethnic groups present in the United States in 1890. The Johnson-Reed Act, as it was also known, explicitly used racial categories that remained on the statute books until the McCarran-Walter Act of 1952 abolished all racial requirements for

citizenship.<sup>42</sup> These racial divisions were regarded as unproblematic until just before WWII. Outside of a few anthropologists and social scientists, no one questioned them. With heightened awareness of the existence of racial and ethnic groups in the United States, few could justify opposition to policies that treated these groups *as* groups. At this stage, no one objected to quotas.

Changes to liberal thought also occurred fairly abruptly as it became obvious that international events demanded an international role. Historian Elazar Barkan argues convincingly that official antipathy towards race categories emerged suddenly in 1938 when it became obvious that the US would have to play a decisive role both in the coming war and in the post-war period.<sup>43</sup> Gary Gerstle observed that Hitler's rise to power in one of the world's most technologically and culturally advanced societies "directly challenged two convictions that had sustained American liberalism since the early 1920s; first, that the taming of capitalism was the pre-eminent problem confronting industrial societies and, second, that issues of ethnic and racial discrimination were best left alone or addressed indirectly... These problems were not secondary; they were themselves primary."<sup>44</sup>

### Gunnar Myrdal and the American Creed

Capturing the spirit of the new war-time racial liberalism, the Swedish sociologist Gunnar Myrdal defined America's treatment of African-Americans as the primary aspect of the problem in the USA. He was called upon in 1938 by the Carnegie Corporation to conduct a comprehensive study of American race relations. Myrdal

assembled all those with experience in researching Negro problems for his vast project while staying very much in control of the end product. The study gained in stature after the war began and mobilisation against fascist ideology started in earnest. It was published in 1944 with some fanfare. Myrdal's *An American Dilemma* appears in the bibliographies of many works considering racial problems and race relations.<sup>45</sup> This massive two-volume tome remained the *modus operandi* for race relations for twenty years. It drew the nation's attention to the plight of African-Americans and called on all Americans to vigorously work towards a solution to the dilemma.

Myrdal's work is remarkable not because of new formulations of the problem of race in the US. *An American Dilemma* was only one of a number of works attacking previously accepted racial dogmas<sup>46</sup> but it was unique in its concentration on black Americans and in its assertion that the treatment of its most downtrodden minority represented a test for American democracy. What stands out about Myrdal's study is its sheer size and comprehensiveness but also its summation, or perhaps even definition, of liberal attitudes towards race during the war. Myrdal displayed an insight into the rise to world leadership of the United States at this juncture of history. In the final chapter, he warned that the Soviet Union would attract the international rising tide of coloured people with egalitarian propaganda. The ability of the United States to counteract such propaganda, her international standing and security depended upon how the race problem was handled.

Efforts to sum up the themes running throughout such a huge study, as contemporary reviewers complained, prove difficult because of the vast scope of the project. However, several themes emerged that would prove important for liberal

thinking on race in the post-war period. Perhaps the strongest theme to emerge in *An American Dilemma* was that of what Myrdal identified as the “American Creed.” This was a set of values that Myrdal saw as continuous throughout American history stemming from the Enlightenment that militated towards racial equality, a tendency toward equality, justice and fairness that was finally “realising itself.” “The American Creed is a humanistic liberalism developing out of the epoch of Enlightenment when America received its national consciousness and its political structure.”<sup>47</sup> Myrdal held firmly to his belief that all Americans, even those most bigoted Southerners, subscribed to this peculiarly American belief in the essential equality of humanity. He dedicated large tracts of *The American Dilemma* to proving the existence of the Creed in the South as well as in the urban North, buried as it might be beneath justifying myths of racial superiority and inferiority. In Myrdal’s view, the Creed’s powers attained a near magical healing power: “When the American Creed is once detected”, he enthused, “the cacophony becomes a melody.”<sup>48</sup>

A second theme was that the American race problem was national, rather than regional, and existed on the white side of the equation. Whereas in the 1930s the problem of black oppression was generally analysed as one of many in a constellation of problems emanating from economic inequality, Myrdal redefined it as a moral problem existing not just in the structures of American society but in the hearts of whites. Such an analysis gave Myrdal (and other liberals) great hope for eradicating the problem: “The deeper reason for the technical simplicity of the value aspect of the Negro problem is this: From the point of view of the American Creed the status accorded the Negro in America represents nothing more and nothing less than a century-long lag of public

morals.”<sup>49</sup> The contradiction between the Creed and the practical treatment of Negroes, he insisted, led to whites harbouring irrational fears and prejudices about blacks. From this, Myrdal implied that Blacks need not organise themselves in order to eradicate the racial divisions that held them down.<sup>50</sup>

## Institutions

A third theme was that American democratic institutions were basically sound and provided the best vehicles with which to purge white Americans of their racism. During the 1930s these same institutions had become widely questioned and Myrdal sought to bolster them. American liberalism defined itself against the racism of Nazi Germany but, just as importantly, against the socialism of the Soviet Union, which had been using racial inequality in the United States as one of its key propagandistic points since the 1928 Communist International (Comintern). The American Creed expressed liberal optimism that equality of opportunity, the current embodiment of the American Dream, would create the best of all possible worlds. Though undoubtedly part of the problem, for Myrdal institutions remained the most hopeful solution to the prejudices within the hearts of white Americans, necessary to restrain the “undemocratic, unAmerican” tendencies within the masses. Democratic institutions must imbue the masses with “democratic values”:

The school, in every community, is likely to be a degree more broadminded than local opinion. So is the sermon in church. The national labor assembly is prone to decide slightly above the prejudice of the median member. Legislation will, on the whole, be more equitable than the legislators are themselves as private individuals. When the man on the street acts through his orderly collective bodies, he acts more as an American, as a Christian and as a humanitarian than if he were



acting independently...

Through these huge institutional structures, a constant pressure is brought to bear on race prejudice, counteracting the natural tendency for it to spread and become more intense.<sup>51</sup>

Myrdal, it is important to note, inveighed against proportionalism. He precluded the use of quotas as “unconstitutional” for the purpose of preserving individualism when he considered the question. “This norm (whereby blacks and whites share resources according to their proportions in the population) is in conflict with the Constitution, since it refers to the Negro *group* and does not guarantee *individuals* their right.”<sup>52</sup>

Myrdal put forward the case for social science to play a greater role. He lectured social scientists within the United States under the heading “Intellectual Defeatism.” He railed against “the ‘do nothing’ tendency... in present day social science.”<sup>53</sup> He noted that an educational offensive against racial intolerance “has never seriously been attempted in America.”<sup>54</sup> However, he was optimistic that, if social science made a supreme effort, it would only be a matter of time before America would overcome its racial divide. He thought it possible that through enlightened intervention “institutions can be changed” and believed in “the improvability of man and society.” Myrdal was careful not to insist that these changes should emerge *too* fast; instead, “*changes should, if possible, not be made by sudden upheavals but in gradual steps...*”<sup>55</sup>

Myrdal’s optimism about the ability of American society to socially engineer change resonated within liberal circles during the war. Liberals’ contribution to new Deal policy-making and to war mobilization “proved their capacity for social engineering on the grandest scale. No problem was too great for them to handle.”<sup>56</sup> Myrdal deliberately aimed his book at liberals; the dilemma was up to them to solve:

“But with few exceptions, only the liberals have gone down in history as national heroes.”<sup>57</sup> More importantly, Myrdal expressed the uneasy combination of pessimism and optimism that infected liberalism at that time: “The practical inference is that *the social engineering required should have its basis in a deliberate and well-planned campaign of popular education.*”<sup>58</sup> This emphasis on education of whites became a hallowed principle for race relations officials for twenty years.

### The Influence of Myrdal

Soon after its publication, *An American Dilemma* became the most cited authority on race relations, buoyed in its authority by the increased interest in racial equality surrounding the forming of the United Nations and the attention of figures such as Wendell Wilkie and Eleanor Roosevelt to the problem. David Southern notes that: “For twenty years, the Swede’s authority was such that liberals simply cited him and confidently moved on.”<sup>59</sup> Myrdal’s influence amongst government and legal personnel, especially those involved in civil rights issues, seemed to know no bounds in the post-war period. The 1948 Truman initiative on civil rights, *To Secure these Rights*, capitalised the term “Creed” and quoted whole lines straight from Myrdal. One of the authors of the pamphlet, Robert Carr, told a house committee that the aim of the report was to “restate the American Creed or the American Dream.”<sup>60</sup> One of the first tasks that Truman accomplished on civil rights was to banish racial classification from federal government paperwork. Chief Justice Earl Warren voiced the unanimous decision in favour of the plaintiff in the famous *Brown v. Board of Education* decision, citing Myrdal in footnote

II: “And see generally Myrdal, *An American Dilemma* (1944).”<sup>61</sup> Myrdal remained the basic text for civil rights professionals and other government authorities for many years. Harris Wofford, on joining the Civil Rights Commission set up by Eisenhower in 1958, remembered his preparation for the job: “For a while we benefited by the opportunity to read basic literature, collect available information for other sources, and discuss the major issues. The monumental study by Gunnar Myrdal, *The American Dilemma*, ...and the 1947 report of President Truman’s Committee on Civil Rights, *To Secure These Rights*, were our initial texts.”<sup>62</sup>

However, the climate in which Myrdal’s book was published soon changed. Unlike the situation after World War I, the American economy regenerated shortly after the end of the war. Liberals, encouraged by what seemed like an automatic improvement of race relations by growing prosperity, discarded their attempts at social engineering in the hopes that further economic growth would erase racial lines in the same way it appeared to have eased ethnic divisions. Additionally, social engineering faced opposition as, in 1943-44, Congress reduced or eliminated many of the interventionist New Deal programs such as the Works Progress Administration (WPA), the Community Civilian Corps (CCC), the National Youth Administration and many others. The race problems during the war, demonstrated most violently in the Detroit riots of 1943, calmed in the aftermath of the war and the Fair Employment Practices Committee (FEPC), the overseer of equal opportunity in defence contractors forced from the Roosevelt Administration by H. Phillip Randolph’s threat of a march on Washington, was not renewed after the war. Labor tensions immediately after the war removed attention from race problems. The theory of “totalitarianism” associated State planning

with Nazism and communism. The wartime experience, lamented Reinhold Niebuhr, “has prompted the democratic world to view all collectivist answers to our social problems with increased apprehension.”<sup>63</sup> Instead of State solutions, other institutions such as the school and the church, became seen as the bulwark against racial attitudes. Though Myrdal’s book was hardly ignored, the urgency with which he treated the problem, as well as his social engineering solutions, were increasingly played down. The book went out of print by 1948.<sup>64</sup>

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<sup>1</sup> Hugh Davis Graham, “Race, History, and Policy: African-Americans and Civil Rights Since 1964” in Hugh Davis Graham, ed., *Civil Rights in the United States* (University Park, PA: PSU Press, 1994), 12-39, 19, 20.

<sup>2</sup> Daniel Bell, “On Meritocracy and Equality,” *The Public Interest*, No. 29, Fall 1972, 29-68. See also Daniel Bell, *The Coming of Post-Industrial Society* (NY: Basic Books, 1973), where he expanded upon the ideas posited in his article. Bell observes: “What is extraordinary about this change [to affirmative action] is that, without public debate, an entirely new principle of rights has been introduced into the polity.” (7)

<sup>3</sup> Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (London: Harvard University Press, 1987).

<sup>4</sup> Cited in A. James Reichley *Conservatives in an Age of Change: The Nixon and Ford Administrations* (The Brookings Institution: Washington, D.C., 1981), 165. Graham lists books on “institutional racism” written in 1969 such as Louis L. Knowles and Kenneth Pruitt, eds., *Institutional Racism in America* (London: Prentice-Hall, 1969). But there is no discussion of affirmative action in this book, let alone a discussion of it as the overarching theoretical construct guiding policy. A theory of institutional racism might seem the precursor of affirmative action policies in that individual prejudice is seen as less important than a bias built in to various institutions, thereby requiring institution-wide action rather than individual suits. However, a theory of institutional racism, as Graham acknowledges elsewhere [*The Civil Rights Era: Origins and Development of National Policy 1960-1972* (Oxford University Press, 1990), 472], appeared as early as 1958 in *Five Years of Progress, 1953-1958: A Report to President Eisenhower by the Presidents Committee on Government Contracts* (Washington, DC: Government Printing Office, 1958). Why no “affirmative action” policies were implemented is left unanswered.

<sup>5</sup> A similar point is made effectively by Hanes Walton in his book, *When the Marching Stopped: The Politics of Civil Rights Regulatory Agencies* (New York: SUNY Press, 1988). Walton, however, concentrates on the detrimental effects on the civil rights movement of its capture within the Federal government, rather than visa versa. See also Harold Cruse, *Plural But Equal: A Critical Study of Blacks and Minorities and America’s Plural Society* (New York: William Morrow and Co., Inc., 1987) and Robert C. Smith, *We Have No Leaders: African-Americans in the Post-Civil Rights Era* (New York: SUNY Press, 1996).

<sup>6</sup> Whereas Whitney Young raised the idea of a “Marshall Plan” for blacks in 1963 and originally included a demand for “preferential treatment” for blacks in the campaign for the passage of the 1964 Civil Rights Act, he withdrew this demand. Young had little or nothing to do with later policies that would be termed affirmative action. Journalist Charles Silberman also raised the issue of quota-like policies in an article entitled “The Businessman and the Negro” in *Fortune Magazine*, (September 1963) (97-99, 184-194). However, he had nothing at all to do with later affirmative action policy. See also Charles W. and Barbara

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Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* (Washington, DC: Seven Locks Press, 1985) and Robert D. Loevy, *To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964* (London: University Press of America, 1990).

<sup>7</sup> Kevin Yuill, "The 1966 White House Conference on Civil Rights," *Historical Journal*, 41, 1 (May 1998), 259-282.

<sup>8</sup> Graham, *Civil Rights Era*, 463.

<sup>9</sup> Hugh Davis Graham, "Legacies of the 1960s: The American 'Rights Revolution' in an Era of Divided Governance," *Journal of Policy History*, Vol. 10, No. 3, 1998, 272-287, 275.

<sup>10</sup> John Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (London: University of Chicago Press, 1996), Part 1, "Understanding Resistance to Affirmative Action," 19-66.

<sup>11</sup> Skrentny, *Ironies of Affirmative Action*, 3.

<sup>12</sup> The Urban League included this metaphor in their arguments for preferential treatment for blacks within their "Domestic Marshall Plan" launched in 1963. See Paul D. Moreno, *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America 1933-1972* (London: Louisiana State University Press, 1997), 55.

<sup>13</sup> Stephen Shull also made this criticism in a review of Skrentny's book in the *Journal of Policy History*, Vol. 9, No. 3, (1997), 381-382, 381. Skrentny was, however, repeating the comparisons made by Martin Luther King in *Why We Can't Wait* (New York: Signet Books, 1964), 136-137.

<sup>14</sup> See Skrentny, *Ironies of Affirmative Action*, 6-7.

<sup>15</sup> For a discussion on the 1924 Johnson-Reed Act, see John Higham, *Strangers in the Land: Patterns of American Nativism* (New York: Rutgers University Press, 1988) and Mae H. Ngai, "The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924," *Journal of American History*, Vol. 86, No. 1, June 1999, 67-92.

<sup>16</sup> See Arnold R. Hirsch, "Massive Resistance in the Urban North: Trumbull Park, Chicago, 1953-1966" and Thomas J. Sugrue, "Crabgrass-Roots Politics: Race, Rights and the Reaction against Liberalism in the Urban North, 1940-1964," *Journal of American History*, (September 1995), Vol. 82, No. 2, 522-550 and 551-578.

<sup>17</sup> Cited in Graham, *The Civil Rights Era*, 470.

<sup>18</sup> See, for instance, Stephen Steinberg, *Turning Back: The Retreat from Racial Justice in American Thought and Social Policy* (Boston, MA: Beacon Press, 1995) and Barbara R. Bergmann, *In Defense of Affirmative Action* (New York: Basic Books, 1996).

<sup>19</sup> See Andrew Kull, *The Color-Blind Constitution* (Harvard University Press: London, 1992). Kull feels that the color-blind proposition was never a mainstream belief in the United States but was rather the product of "radical skepticism about our political abilities where race is concerned." (5). Regarding the *Brown* decision, Kull writes: "The opinion written to mark this watershed in the nation's history was designed not to illuminate but to disguise the road being travelled." (155) The courts stopped short, he shows, of prohibiting racial classification.

<sup>20</sup> Steven Ambrose identifies institutions as *systems* rather than as individual organisations. He uses the examples of the corporate system, political parties, the armed forces and labor unions as institutions whereas the Democratic Party, the United States Army and the United Mine Workers are organisations. See Steven E. Ambrose, ed., *Institutions in Modern America: Innovation in Structure and Process* (Baltimore, MD: Johns Hopkins Press, 1967) 2. Another way of expressing the same idea is conveyed in conception of the *public sphere* put forward by Jürgen Habermas. Habermas calls it "an institution mediating between private interests and public power... In contrast to institutions that are controlled from without or determined by power relations, the public sphere promises democratic control and participation." See Robert C. Holub, *Jürgen Habermas: Critic of the Public Sphere* (London: Routledge, 1991).

<sup>21</sup> Thomas J. Sugrue, "The Tangled Roots of Affirmative Action," *The American Behavioural Scientist*, Vol. 41, No. 7 (April 1998), 886-896.

<sup>22</sup> This will be illustrated in later chapters.

<sup>23</sup> See Ellen Herman, *The Romance of American Psychology: Political Culture in the Age of Experts* (London: University of California Press, 1995).

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<sup>24</sup> Arthur Livingstone, "Introduction" to Gaetano Mosca, *The Ruling Class: Elementi di Scienza Politica* (London: McGraw-Hill, 1939) xix. The term "ruling class" will be used interchangeably with "ruling elite" or C. Wright Mills' term, "power elite." Roughly speaking, the elite are, as Alan Brinkley usefully defined them, those "who had inherited, or acquired, a sense of entitlement mixed with civic responsibility that in another time or place might be called *noblesse oblige*." Alan Brinkley, *Liberalism and its Discontents* (London: Harvard University Press, 1998), 165. See especially his chapter entitled "Icons of the American Establishment," 164-209.

Some notes on the methodology employed here regarding the treatment of "liberalism" and "liberal institutions" are appropriate at this point, especially the assumptions made as to the nature of the relationship between American society, the American state, individuals and the public sphere. First, as Weber observed, "all administration means domination." Political scientist Theodore Lowi expressed the same sentiment thus: "*Rationality applied to social control is administration.*" [italics original] in *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* [New York: W.W. Norton & Company, Inc., 1969], 27. The first order of any political system is to maintain control for the ruling class. Material and ideal interests, not ideas, "dominate directly the actions of men." Yet the "images of the world" created by these ideals have often served "as switches determining the tracks on which the dynamics of interests kept actions moving." (Cited in Ilse Dronberger, *The Political Thought of Max Weber: In Quest of Statesmanship* [New York: Meredith Corporation, 1971], 305.) It is necessary to understand the ideals, the way in which the ruling class understands itself, in order to reconstruct its parameters for action in given circumstances. In the end, images of the world, or models or "paradigms," must change in order to maintain domination. In the three modes of authority that Weber identified, the system of government in the United States can be clearly identified with what Weber called the "rational-legal" mode, whereby authority is attached to formal rules as they are expedient or rational, instead of either "traditional" authority relating to the legitimacy of leaders in traditional roles (although the Constitution might be identified as a mode of "traditional" authority) or "charismatic" authority, through loyalty to a person who leads. However, Habermas's general criticisms of Weber's rational-legal category – that laws must retain some sort of authority or legitimation in order to be effective – are well-made. See Habermas, *Legitimation Crisis*. Thus, the sphere most relevant to studies of this sphere (at least) of American history is that of the Hegelian category of "Right" (*Recht*) meaning "the whole sphere of norms of various kinds, rationally grounded, by which men determine their conduct in the world. Ethical life (*Sittlichkeit*) includes the actual conduct of men guided by those norms, and is the result of a social process of character-training and habit-forming fostered by these institutions but also (in the modern world) of critical reflection and intellectual grasp." [Friedrich Hegel, cited in Z. A. Pelezynski, *The State and Civil Society: Studies in Hegel's Political Philosophy* (London: Cambridge University Press, 1984) 8]. The liberal institutions referred to in this chapter reflect very directly the norms of American society, the assumptions that guided the actions of individuals. The disappearance of these signposts thus confronted the American ruling class with a crisis of its own authority, necessitating consideration of new short-term and temporary administration.

<sup>25</sup> Godfrey Hodgson, *In Our Time: America from World War II to Nixon* (London: Macmillan, 1976), 491. Herbert Marcuse's influential *One Dimensional Man* (London: Routledge, 1991, ©1964) rails against the rigid conformity of thought that existed in the mid-1960s, contrasting the dialectical thought that existed in classical societies to the sterile consensus of the US in the post-war period. The popularity of his critique surely demonstrates both the universality and strength of the consensus as well as the beginnings of its downfall.

<sup>26</sup> Arthur Schlesinger, Jr., *The Vital Center: The Politics of Freedom* (Boston, MA: Houghton Mifflin Co., 1949), 1.

<sup>27</sup> Schlesinger stated in *The Age of Jackson* that: "(t)he feud between the capitalist and the laborer, the house of Have and the house of Want, is as old as social union, and can never be entirely quieted, but he who will act with moderation, prefer fact to theory and remember that everything is relative and not absolute, will see that the violence of this contest may be stilled." Cited in Stephen P. Depoe, *Arthur M. Schlesinger and the Ideological History of American Liberalism* (London: University of Alabama Press, 1994), 9.

<sup>28</sup> Schlesinger, *The Vital Center*, 256.

<sup>29</sup> Schlesinger, *The Vital Center*, 1.

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- <sup>30</sup> Cited in Depoe, *Arthur M. Schlesinger, Jr., and the Ideological History of American Liberalism*, 9.
- <sup>31</sup> Cited in Stephen Rousseas and James Farganis, "The American Scene: Retreat of the Idealists," *The Nation*, (March 23 1963), 240-244.
- <sup>32</sup> Herman, *The Romance of American Psychology*, 57.
- <sup>33</sup> See, for instance, T. W. Adorno et al, *The Authoritarian Personality* (Harper and Brothers: New York, 1950). Many of the most prominent authors on racial issues, such as Gordon Allport and Bruno Bettelheim, were psychologists.
- <sup>34</sup> C. B. Sudborough, *Should the Motor Vehicle Be Regulated? Why the National Welfare Requires Affirmative Action*, Address delivered before the Wilmington, Delaware, Chamber of Commerce, December 13, 1932 (Wilmington: Wilmington Chamber of Commerce, 1932).
- <sup>35</sup> See Graham, *Civil Rights Era*, 465.
- <sup>36</sup> Moreno, Paul D., *From Direct Action to Affirmative Action*, 7-8.
- <sup>37</sup> See Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (London: W.W. Norton and Co., 1996), 312 (fn 14).
- <sup>38</sup> Moreno, *From Direct Action to Affirmative Action*, 30.
- <sup>39</sup> Moreno, *From Direct Action to Affirmative Action*, 58.
- <sup>40</sup> See Moreno, *From Direct Action to Affirmative Action*, 57-65. Moreno admits that "the quotas were grants of immunity - and this may explain why they were never challenged by contractors. Usually the quotas were exceeded, so black groups did not try to sue for enforcement." (64).
- <sup>41</sup> See Alan Brinkley, *End of Reform: New Deal Liberalism in Recession and War* (London: Harvard University Press, 1998).
- <sup>42</sup> It is worth noting that, despite the fact that explicitly racial requirements were abolished, the Immigration and Naturalization Act continued to favour immigrants from Northern Europe.
- <sup>43</sup> Elazar Barkan, *The Retreat of Scientific Racism*, (Cambridge University Press: Cambridge, 1992). *Survey Graphic* magazine, a liberal news magazine published in the inter-war period, contains interesting indications of the confusion surrounding American attitudes towards issues connected with race. In one issue, published in 1936, foreign correspondent John Palmer Gavit polemicizes against the barbarity of Hitler's treatment of Jews while a few pages later J.H. Landman argues blandly for the adoption of German sterilisation programmes in the United States. [John Palmer Gavit, "Report from Europe," J.H. Landman "Sterilization and Social Betterment" in *Survey Graphic Magazine*, (March 1936)].
- <sup>44</sup> Gary Gerstle, "The Protean Character of American Liberalism," *American Historical Review*, Vol. 99, No. 4 (October, 1994), 1045-1074, 1070.
- <sup>45</sup> This is perhaps less true today because of a the popularity of a relativist critique that attacks Myrdal both for his neglect of the role of African-Americans in the battle against racial discrimination and because he is "fatalistic and deterministic in championing the ameliorating power of government and laws to eliminate racial injustice." Robert F. Burk, *The Eisenhower Administration and Civil Rights* (University of Tennessee Press: Knoxville, 1984). See also Stanford Lyman, "Race Relations as Social Progress," Herbert Hill and James E. Jones, Jr., eds., *Race in America*, (University of Wisconsin Press: Madison, 1993), 78-99.
- <sup>46</sup> See, for instance, Gunnar Dahlberg, *Race, Reason and Rubbish: An Examination of the Biological Credentials of the Nazi Creed* (London, Allen and Unwin, 1942) and Ruth Benedict, *Race and Racism* (London: Routledge, 1942). For an excellent discussion of the shift in thinking regarding race amongst anthropologists, psychologists and sociologists occurring just before and during WWII, see Barkan, *The Retreat of Scientific Racism*.
- <sup>47</sup> Gunnar Myrdal, *An American Dilemma: the Negro Problem and American Democracy*, (Harper & Brothers Publishers: New York, 1944), 8.
- <sup>48</sup> Myrdal, *An American Dilemma*, 3.
- <sup>49</sup> Myrdal, *An American Dilemma*, 24.
- <sup>50</sup> He entitles one section "A White Man's Problem" and states that: "It is thus the white majority group that naturally determines the Negro's 'place.'...The Negro's entire life and, consequently, also his opinions on the Negro problem, are, in the main, to be considered as secondary reactions to more primary pressures from the side of the dominant white majority." *An American Dilemma*, xlvii.
- <sup>51</sup> Myrdal, *An American Dilemma*, 80.
- <sup>52</sup> Myrdal, *An American Dilemma*, 336 (italics in the original).

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<sup>53</sup> Cited in David W. Southern, *Gunnar Myrdal and Black-White Relations: The Use and Abuse of An American Dilemma, 1944-1969* (London: Louisiana University Press, 1987), 58.

<sup>54</sup> Cited in Southern, *Gunnar Myrdal and Black-White Relations*, 59.

<sup>55</sup> Myrdal, *An American Dilemma*, 518.

<sup>56</sup> Gerstle, "The Protean Character of American Liberalism," 1070.

<sup>57</sup> Myrdal, *An American Dilemma*, 7.

<sup>58</sup> Myrdal, *An American Dilemma*, 383 (italics in the original).

<sup>59</sup> The next sentence reads: "If historians need to understand the rudiments of Keynesian economics to teach effectively the recent past, then they surely need to know something of Myrdal, the Keynes of American race relations." Southern, *Gunnar Myrdal and Black-White Relations*, xvi.

<sup>60</sup> Leon Friedman, ed. *The Civil Rights Reader: Basic Documents of the Civil Rights Movement* (Walker and Company: New York, 1967), 67.

<sup>61</sup> cited in Southern, *Gunnar Myrdal and Black-White Relations*, 123, 127. David Levering Lewis, while agreeing on the impact of Myrdal's work, maintains that it was influential for a shorter space of time: "The impact of *An American Dilemma* was so potent that it controlled racial thought and policy for at least a decade." Lewis, in common with many civil rights scholars, sees the origin of all civil rights activity as a white recognition of the importance of black votes. Lewis, "Origins and Causes of the Civil Rights Movement," in Charles Eagles, *The Civil Rights Movement in America* (London: University Press of Mississippi, 1975), 74-92, also Stephen R. Graubard, Preface to the Issue "An American Dilemma Revisited," *Daedalus* Vol. 124, (Winter 1995), V-XXXIV.

<sup>62</sup> Harris Wofford, *Of Kennedys and Kings: Making Sense of the Sixties*, (Farrar, Strauss, Giroux: New York, 1980), 465.

<sup>63</sup> cited in Brinkley, *Liberalism and Its Discontents*, 86.

<sup>64</sup> As a useful background to the changes in liberalism after the war, see chapter 5 of Brinkley, *Liberalism and Its Discontents*, "The Two World Wars and American Liberalism" (79-110). See also Gareth Davies, *From Equal Opportunity to Entitlement: the Transformation and Decline of Great Society liberalism* (Lawrence, Kansas: University Press of Kansas, 1996).



## Chapter 2

# GOVERNMENTAL AFFIRMATIVE ACTION IN THE POST-WAR PERIOD

Most observers point to Kennedy's Executive Order 10925 of 1961 as the first mention of the phrase affirmative action in the context of black civil rights, emerging only after the civil rights movement had begun a concerted campaign for black civil rights.<sup>1</sup> However, "affirmative action" in regard to race appeared years earlier both as a phrase and at least as a possible policy option. Five years after the demise of the Federal FEPC in 1946, President Truman issued a further executive order to ensure that federal contractors followed policies of nondiscrimination. Truman signed executive 10308 on December 3 1951, which provided that all government contracts and subcontracts have non-discrimination clauses. The order also set up the President's Committee on Government Contract Compliance to ensure compliance with the order. Staffed by members of the business community, labor representatives, social workers and federal employees, it had no powers of enforcement, however, and had to convince contracting agencies to weed out discriminating contractors. As such its impact was negligible. On January 16 1953, it published an obscure final report for what was apparently a very limited audience.<sup>2</sup> The committee made such a small impact that its very existence was entirely overlooked by a similar report issued by a committee appointed by Eisenhower.

What is indicated in this report and others published around the same time is that some sort of affirmative action – rather than simply nondiscrimination measures – remained an obvious but undesirable option for policy elites during the 1950s. The

inherent problems of “voluntaristic” policies were well-known even at this stage. Overt discrimination was not seen as the major problem; instead, the problem, as Vice President Nixon would state in 1955, was “like an iceberg, only part of is it visible.”<sup>3</sup> The report rehearses the idea that positive measures had to be taken to attack racial inequality. Suggestions included advertising specifically “among such groups as the physically-handicapped, upper-age groups, women, minority groups.”<sup>4</sup> Mirroring the concerns that resulted in the Philadelphia Plan nearly twenty years later, labor groups were attacked for discriminatory practices: “The Committee recommends that the Federal Committee on Apprenticeship promulgate policies which will *exert maximum influence* to eliminate discrimination and restrictive practices from all apprenticeship programs.” Throughout these reports issued in the 1950s, phrases like “affirmative stand,” “exert maximum effort,” “a need for definite action,” and “act positively and affirmatively” can only indicate a perception that discrimination must not only be attacked in a negative sense – by outlawing discrimination. Simply not discriminating was not enough.<sup>5</sup>

Even the term “affirmative action” appeared in relation to race relations many years before EO 10925, contradicting the accounts cited above insisting that the term first appeared while Kennedy was president. It was heard during Fair Employment Practice Committee (FEPC) hearings in St. Louis in 1945.<sup>6</sup> The final report of Truman’s Committee on Government Contract Compliance called for “affirmative action” against racial discrimination in its final report in 1953. After seeing encouraging signs of active non-discrimination in the Office of Education against recalcitrant states, the Committee recommended that: “The Bureau of Employment Security take more affirmative action in a program to aid employers, Federal-state Employment Services, and other agencies in

the maximum placement of minority group workers...”<sup>7</sup> The published version of the report contained a use of the phrase with less voluntaristic implications: “Nevertheless, the Office of Education should take more *affirmative action* to persuade states to conform to the enunciated policy of the Federal Government.”<sup>8</sup> Nor was the phrase unknown outside obscure government reports; it occurs in a column heading as well as within the text of an optimistic piece, “What One Visitor Discovered in the South,” by Otis W. Coan that appeared in the NAACP’s periodical, *The Crisis*.<sup>9</sup>

After Eisenhower took over the presidency, a new commission replaced the earlier one. In its publications, it is possible to see some of the assumptions behind today’s affirmative action. In answer to the question, “How can an agency determine whether there was discrimination in a particular action?” a pamphlet put out in 1955 states:

By obtaining information regarding the past practices of the particular supervisor involving members of the same minority group... For example, if a supervisor is accused of racial discrimination because he failed to promote an Indian from a GS-3 to a GS-4 position and the records show that this supervisor had previously, on his own initiative, promoted or appointed other Indians to that or a similar GS-4 position, the indication might be that his decision in the action complained of was not based on racial considerations.

If no Indians had ever been appointed or promoted to a position such as that in question by that particular supervisor, further investigation would become necessary...<sup>10</sup>

When affirmative action machinery was finally installed in the 1970s, this process would become known as a “compliance review.” The supervisor was assumed to discriminate (or at least to warrant further investigation) if he had appointed or promoted no Indians in the past. The implication for the employer was that if he appointed or promoted an unspecified quota of Indians, he would have fulfilled his obligation to equal

opportunity policy. Certainly, racial quotas had not been made illegal as an employment policy of a private employer – the Superior Court of California, dealing with a case where local blacks had picketed a store demanding that more blacks be hired, had declared in 1950 that “it [California] need not forbid the employer to adopt such a quota system of his own free will.”<sup>11</sup>

The one force in society that directly pushed for quotas was the Communist Party of the United States. Through its representative organisations, it sponsored black demands for African-Americans representation in employment within companies in black areas. In *Lucky Stores v. Progressive Citizens of America*, May 26 1947, a case before the California Supreme Court, a “communist-dominated branch of the NAACP” in Richmond, CA, picketed Lucky Stores because of alleged brutality to a shoplifter and insisted that the store’s workforce approximated the black proportion of Lucky’s custom. The communist-front organisation, the Progressive Citizens Association, lost at the California Supreme Court but a notable dissent was made by Roger Traynor. In his opinion, minorities “may seek economic equality either by demanding that hiring be done without reference to race or color or by demanding a certain amount of jobs for members of their group.”<sup>12</sup> This is not to say that all requests for quotas of minority hiring emanated from the Communist Party. One of the original demands made by those boycotting the buses in Birmingham, Alabama in 1956 was that a number of black busdrivers to be hired.<sup>13</sup>

Progress in combating racial discrimination, despite the declared good intentions of both federal and state governments at the time, was slow if not non-existent. One trumpeted accomplishment was that, in 1960, “a Negro electrician was hired for the

first time in the District of Columbia by a contractor engaged in the construction of a Federal building.”<sup>14</sup> This took place only after threatened litigation. However, such small gains still looked good in percentage terms; a second Negro electrician would constitute a 100 percent increase. For African-Americans living at the time, the lack of patience with such glacial progress exemplified by Martin Luther King’s *Why We Can’t Wait* must have been widespread.<sup>15</sup> For many others, too. As Moreno observes, “Clearly by the late 1950s the executive antidiscrimination effort was clearly leaning towards the affirmative action requirements that are usually associated with the next administration.”<sup>16</sup>

The theory of “institutional racism” that forms the basis to affirmative action policies, whereby unintentional racism, through systematic exclusion of African-Americans from employment through what appear to be non-racist patterns and practices, presents the biggest barrier to equality, was certainly well-rehearsed in the 1950s. The New York Supreme Court, for example, in its summing up of *Holland v. Edwards* (1953) found against an employment agency that inquired into an applicant’s change of name. To the agency’s contention that the name change inquiry was not intentional discrimination, the court answered: “Discrimination in selection for employment based on considerations of race, creed, or color is quite apt to be a matter of refined and elusive subtlety. Innocent components can add up to a sinister totality.”<sup>17</sup> In a report by Eisenhower’s Committee on Government Contracts, of which Vice President Nixon was chairman, the observation was made that: “Overt discrimination, in the sense that an employer actually refuses to hire solely because of race, religion, color, or national origin is not as prevalent as is generally believed. To a greater degree, the indifference of employers to establishing a positive policy of nondiscrimination hinders qualified

applicants and employees from being hired and promoted on the basis of equality.”<sup>18</sup> The theory, or at least the reasoning behind it that effects and not intentions were harmful, was familiar to policymakers in the 1950s.

Theoretically, based on Truman’s Executive Order in 1948 declaring that contractors must include a non-discrimination clause (Eisenhower renewed this clause upon taking office in 1953), the Federal Government had the power to cancel contracts and to debar contractors from further government contracts. Richard Nathan, in a report written for the Civil Rights Commission in 1969, claimed that several firms were debarred during the Eisenhower and Kennedy administrations.<sup>19</sup> Though Kennedy undoubtedly made specific the penalties for discrimination in his Executive Order, there is no evidence to support Skrentny’s contention that the first agency with “real power” was Kennedy’s President’s Committee on Equal Employment Opportunity (PCEEO). The PCEEO as Skrentny states, “had the power to enforce penalties if it found discrimination by government contractors” but so did the heads of Federal Government agencies under Truman and Eisenhower.<sup>20</sup>

All the parts were in place; the analysis of the problem of institutional racism was at least vaguely understood in government circles, the necessity for some sort of proportional solution to the problem of employment discrimination had been grasped, the mechanism for enforcing it existed. Yet it was not used. The only effort at initiating affirmative action policies was to cajole and coax business to implement programs. As one official in Truman’s contract compliance committee observed, “(i)t is not the desire of the Committee to win compliance with a club. The processes of education and appeals to human decency and basic American principles will be the prime weapons against

discrimination.” To insist would have been to undermine faith in the ability of American business to accomplish the task itself, to admit that, far from being a rational force for progress, this American institution pushed the country away from its democratic goal of equal opportunity. Not only that, forcing Americans to accept quotas of minorities, it was thought, would not be successful: “It is a well known fact that the most effective means of obtaining compliance with any statute, regulation or order is by achieving acceptance on the part of the public. There is no budget large enough to force adherence to an unaccepted law, as witness prohibition.”<sup>21</sup>

The key to understanding why liberals seldom called for quota-based policies lies in the way they analysed the problem. If the problem did exist, as Myrdal insisted (and virtually no one had contradicted him), on the white side of the equation and if it was believed that reforming the “habits” of the white population was possible, quota-based policies would provoke white anger and thus create a barrier to resolving the problem. Even when quotas might seem like a necessary short-term answer to a particular problem, they were resisted for that very reason. Logically, in order for quotas to be considered as a realistic option, the idea that whites could eventually be weaned away from prejudices and that this would result in blacks playing an equal role in all aspects of American life would have to be discarded.

Contract compliance had to be “sold” to employers, the committee thought. Much of the efforts of the Truman Committee and its inheritor in the Eisenhower administration directed themselves towards explaining to employers that discrimination was bad business. For example, a pamphlet put out by the CGC warned

prejudiced company owners that “a discriminatory attitude on the part of employers or employees may result in:

- Cost to employers
- Wasted skills
- Destruction of competition
- Cost to community
- Destruction of employee incentives
- Cost to Nation
- Lowered purchasing power”

With the benefit of considerable hindsight, we might speculate that a more positive response on the part of employers could have been forthcoming had “rioting” been added to the list. The same document asked in a question and answer section whether racial proportionalism might be utilised. The peremptory treatment given the question by the pamphlet indicates that such issues were beyond serious consideration: “Should the interviewer making referrals try to send out a certain percentage or “balance” of Negro and white workers? Ans. No. Referrals based on qualifications for a job avoid the proportion consideration.”<sup>22</sup>

In its voluntary guise, and only implemented in specific circumstances, affirmative action did not necessarily contradict the framework of racial liberalism whereby racial inequality was best addressed by convincing individual whites that racial discrimination was irrational or morally wrong. The affirmative action programs that the government employed were designed to be exemplary, aiming at cajoling and even threatening businessmen into hiring more African-Americans and thus integrating them, from the top down. As Truman’s Contract Compliance Committee emphasised by capitalising the following sentence, “DEMOCRACY THRIVES ON VOLUNTARY ACTION BY MEN OF GOOD WILL. PREJUDICE IN EMPLOYMENT CAN BE



DEFEATED MOST EASILY WHERE IT BREEDS - IN FACTORIES, UNIONS, AND COMMUNITIES.”<sup>23</sup>

## Anti-Communism

Within the reports issued by the Truman and Eisenhower Committees, the importance of equal opportunities for black Americans was continuously stressed in light of America’s role as world leader in the fight against communism. Certainly, there was awareness that many emerging third-world countries found America’s race relations deeply unattractive. The Soviet Union made the race situation in the United States one of its most important propagandistic points throughout the early post-war period. The Truman Committee warned that:

There was a day when the prejudices which sap the moral and economic strength of our country were of little concern to other peoples of other nations. Not so in 1952. This is no longer the problem of several states. The spotlight of world leadership in the fight against tyranny and oppression reveals shortcomings which our enemies are exploiting on every continent.

Throughout the report, various mentions of the world role of the United States are repeated: “The summons to reaffirm the philosophy of equality is issued at a critical moment in history. The leadership of the United States is being tested throughout the world as a citadel of freedom and defender of individual rights for all men. We must fortify the claim to this leadership by deeds among our own people.”<sup>24</sup>

Why, given the high priority allegedly given to combating racial prejudice, did the report issued by the Truman committee in 1953 receive so little attention? Voting rights and racial segregation of schools and facilities attracted some attention nationally

throughout the 1950s, especially after *Brown v. Board of Education* in 1954. The heightened awareness of the domestic “threat” of communism after Senator McCarthy made his widely-publicised charges made racial liberals wary of repeating or even being too sensitive to charges made by the Soviets. Labor issues might have been more sensitive than those of education, given the connection between many unions prominent in war industries and Moscow. But another answer is given in correspondence from Durward V. Sandifer, Acting Assistant Secretary for United Nations Affairs, to Robert Granville, chairman of the committee dated August 22, 1952. “One of the most persistent themes of the Communists is the alleged widespread racial discrimination practised in the United States. This theme is only infrequently stated in terms of discrimination in employment practices. Much greater emphasis is placed upon more general charges of the denial of human rights.” Thus, the committee and its recommendations, minimal though they were, could be safely ignored by Truman and the incoming Eisenhower, world attention being fixed on human rights and not employment issues.<sup>25</sup>

### Intellectual Dissent Against the Myrdalian Paradigm

Dissenters against Myrdal’s “American Creed” analysis of race relations were lumped into two camps – those influenced by Communist Party literature on race relations and white Southerners. They were conveniently marginalised and Myrdal remained virtually unquestioned within the social science community at the time. Nothing either communists or Southerners had to say made much impact against the inexorable tide of opinion in favour of his study. Southern liberals’ published criticisms

mildly chastised Myrdal for his insistence that the pace of change in the South should be forced but acknowledged the sometimes painful accuracy of his assessment of the racial situation in the South. The black intellectual Oliver C. Cox, in *Caste, Class and Race*, scored Myrdal's perception that racial beliefs were the most important aspect holding back blacks: "If beliefs, per se, could subjugate a people, the beliefs which Negroes hold about whites could be as effective as those which whites hold against Negroes."<sup>26</sup> Accurate as Cox's criticism might have been, his associations with the Communist Party ensured that they were marginalised. Herbert Aptheker attacked Myrdal's study vociferously for ignoring black culture, foreshadowing criticisms heard more recently, as well as for Myrdal's insistence that economic structure had little to do with black oppression. However, Aptheker also towed the increasingly unpopular Communist Party line, assuring that his criticisms remained in obscurity until some years later.<sup>27</sup>

Racial problems cooled considerably in the chill of the Cold War. Despite the growing preoccupation with the issue of civil rights towards the end of the 1950s, as the protests attracted more and more of the ire of the white South, no fundamental rethink of race relations took place within the realm of social science up until the 1960s. In fact, few analyses of the problem of race appeared at all in the 1950s. Most social scientists rejected the concept of race entirely, preferring more general concepts such as "group hostility," "value difference" or "intergroup relations." Oscar Handlin was able to ask in his 1957 book, *Race and Nationality in American Life*, "What ever happened to race?"<sup>28</sup> A few years later, sociologist Talcott Parsons still attempted to provide a socio-psychological model in which to place racial problems, demonstrating either the longevity of certain race relations concepts or the unwillingness of social science to

confront the problem in its own terms: “Where such a large reservoir of repressed aggression exists but cannot be directly expressed, it tends to become ‘free-floating’ and to be susceptible of mobilization against various kinds of scapegoats outside the immediate situation of its genesis.”<sup>29</sup>

Most of Myrdal’s assumptions about the nature of the problem remained unchallenged in literature. The final, concluding sentences of Abram Kardiner and Lionel Ovesy’s influential 1951 work, *The Mark of Oppression*, read:

Obviously, Negro self-esteem cannot be retrieved, nor Negro self-hatred destroyed, as long as the status is quo. What is needed by the Negro is not education, but *re-integration*. It is the white man who requires the education. *There is only one way that the products of oppression can be dissolved, and that is to stop the oppression.*<sup>30</sup>

Gordon Allport, whose book on prejudice was regarded as one of the most authoritative during the 1950s, introduced the “contact theory,” based on the military research of Samuel Stouffer and the study on housing by Mary Evan Collins and Morton Deutsch. The idea, entirely in line with Myrdal’s assertion that the prejudice of white Americans constituted the large part of the problem of black American inequality, was that increased contact between blacks and whites would decrease prejudice.<sup>31</sup> In the event, it is possible to understand Allport’s optimism. The desegregation of the army, widely predicted to cause chaos, withstood the test of Korea, encouraging belief that a low profile effort to desegregate would provoke the least resistance. At most, government action to desegregate consisted of a series of court decisions eradicating the vestiges of federal complicity in segregation.

Underlining the reliance of social theory on Myrdal’s insistence that racism was a “white man’s problem,” the fear when black civil rights campaigns began in

the 1950s was of white resistance to change. The liberal line on civil rights expressed, above all else, the need to quell “totalitarian” tendencies that might, if unchecked, grow into mass movements. Black protest was beside the point at that stage. As Walter Jackson percipiently notes:

If you had asked a white liberal in the 1950s about “mass movements” in conjunction with civil rights, he or she would probably have expressed fears that white resistance to desegregation in the South might lead to a right-wing extremist mass-movement that could become anti-Semitic or anti-Catholic, since prejudiced people could easily turn their hostility from one target group to another. Thus liberals tended to assume that maintaining law and order worked in the interest of racial justice.<sup>32</sup>

It is important to note at this stage that several streams of racial liberalism existed during the 1940s and 1950s, all influenced by the more liberal attitudes regarding race during and after the war. In this period the factors that united them were more important than the disagreements between them, although, in the 1960s the disagreements rose to the surface. The most committed to the cause of civil rights, of course, were black Americans themselves. Black civil rights activists prioritised achievement of equality above the stability of the liberal order, though most felt at the time that their best hope of achieving their aims was through lobbying and pressurising liberal leaders in power.<sup>33</sup> On a political level, black Americans tended to be within the Democratic New Deal coalition. Left-wing (but still anti-communist) liberals tended to welcome the civil rights protests in the 1950s. Southern white radical liberals such as James Anderson Dombrowski, Virginia and Clifford Durr, Anne and Carl Braden and others had rallied to the cause of better treatment for blacks in the South as early as 1938 on the basis that continued segregation and devaluation of black Southerners held Southern development back. They maintained their commitment throughout the 1950s and 1960s. However, due

to the climate created by McCarthyism in the South, the central organisation of these liberals, the Southern Conference for Human Welfare and, later, the Southern Conference Education Fund, despite being roll-calls of prominent black and white liberal activists, were barely able to sustain themselves and made, by their own admission, little impact on Southern white attitudes.<sup>34</sup> More mainstream liberals initially welcomed black protests but expressed nervousness about possible responses by Southern whites. The *Nation* blended optimism with concern about the effect on the Democratic Party of such protests. The *New Republic* took a surprisingly even-handed approach, publishing pieces such as “The NAACP’s New Direction” by Paul Jacobs, which complained in 1956 of the growing militancy of the NAACP.<sup>35</sup> It also featured debates between Southern “moderates” (defined as wishing to slow down but not entirely stop desegregation) such as Virginia state Senator Benjamin Muse and NAACP representatives such as Thurgood Marshall.<sup>36</sup>

The dominant liberal perspectives came from the liberal intelligentsia. To them, there was simply a technical problem in an otherwise working democracy. Racial equality would make democracy stronger, they reasoned, and thus it was worth supporting. Seymour Martin Lipset expressed what was no doubt the consensus amongst the intelligentsia when he wrote: “Democracy is not only or even primarily a means through which different groups can attain their ends or seek the good society: *it is the good society itself.*” In other words, the goal of the liberal intelligentsia was the perfection of the democratic system rather than the alleviation of the conditions of black Americans. However, even those more critical of American democracy looked upon the civil rights struggle primarily as a means to an end rather than the end itself. As the left-

wing publication *Liberation* magazine put it in 1964, when the cracks were beginning to appear, “In our opinion, civil rights, vitally necessary though they are, are not an end in themselves, but a beginning towards the really good society in which man will be really equal – economically and socially *as well* as politically.”<sup>37</sup>

The factor that united these disparate streams of liberalism was *progress*. Liberals of all hues were able to group together under the banner of progress toward racial equality, whether they saw as the end the perfection of democracy, the creation of real democracy or simply black equality. As long as progress toward it appeared to be forthcoming and the enemy of it could be clearly identified, a broad consensus (outside of most southern whites) existed. Federal Government action against the Southern recalcitrants seemed the best possible method of achieving this goal to nearly everyone that considered themselves liberal. Loren Miller, writing in the early 1960s, stated that:

Of course there are liberals and liberals, ranging from Left to Right: still there does exist a set of beliefs and attitudes, not easily defined but readily identified, constituting the liberal outlook on the race question. Simply stated, it contemplates the ultimate elimination of all racial distinctions in every phase of American life through an orderly, step-by-step process adjusted to resistance and aimed at overcoming such resistance.<sup>38</sup>

When civil rights movement activists began to take direct action, more moderate liberals became uneasy. While the commitment of the civil rights movement to achieving patriotic American values made liberals sympathetic, the social activism – despite its religious and non-violent nature – made many mainstream liberals worry that instability caused by direct action might be more harmful to American democracy than the good of achieving racial equality faster. The liberal Texan Johnson aide Harry McPherson remembered Martin Luther King’s bus boycott as “vaguely disturbing” because of the “Negroes’ assertiveness, the use of the active voice on their own behalf.”<sup>39</sup>

However most liberals welcomed the emergence of the question, confirming, as it did, their theories on the need to control irrational mobs, personified in Southern whites. They called not for mass support of the civil rights movement but for firm government action.

After *Brown*, Southern resistance began getting organised. While civil rights groups also began organising, their existence inspired little comment, let alone revision of the Myrdalian model. As Jackson shows, only *The New Republic* contained any coverage of the Montgomery Bus Boycott, “an event that was greatly overshadowed in the national press by Massive Resistance.” Throughout the 1950s race relations were considered legally and politically tricky but not yet intellectually problematic. Most mainstream liberal Americans felt they understood black anger but equally felt that protests and demonstrations hurt the cause by provoking white anger.<sup>40</sup>

## The Kennedy Era

By the end of the 1950s, issues involving race no longer could be avoided. The liberal response to this challenge to the existing institutions, however, was to regard it simply as a challenge and to redouble existing efforts. Conservatives confidently asserted that the best approach was still to do nothing, since American institutions would eventually right themselves. Economist Milton Friedman, writing after the 1957 events in Little Rock, predicted in a characteristically ebullient passage that the South’s problems were anachronistic and would soon disappear:

No one who buys bread knows whether the wheat from which it was made was grown by a communist or a Republican, by a constitutionalist or a fascist, or, for that matter, by a Negro or a white. This illustrates how an impersonal market separates economic activities from political views and protects men from being



discriminated against in their economic activities for reasons that are irrelevant to their productivity - whether these reasons are associated with their views or with their color.”<sup>41</sup>

By the end of the decade, however, confidence in these sorts of assertions began to wane. Kennedy was elected in 1960 to “do something” about America’s problems and he had contrasted himself with the complacency of the Eisenhower years. Civil rights was among the problems identified by the Kennedy team where it was felt that executive action might be needed. Kennedy’s Executive Order 10925, issued in 1961 and containing the term “affirmative action,” created a new agency, the President’s Committee on Equal Employment Opportunity, and provided for more stringent and explicit requirements on government contractors. Despite the new emphasis on enforcement, it created no new standards for proving discrimination. Without specific provable discrimination, little could be done against employers suspected of discriminating. The most visible aspect of the Order was the Plans for Progress program, designed to induce prominent government contractors to devise their own plans for increasing minority group hiring and employment mobility. The National Urban League’s Whitney Young praised Plans for Progress in 1963 for its preferential hiring policies. However, the NAACP’s Herbert Hill and Martin Luther King were more critical.<sup>42</sup>

The issue of “racial preference” arose while Kennedy was president, causing him to react by stating that he would not countenance quotas, “...not hard and fast quotas. We are too mixed, this society of ours, to begin to divide on the basis of race and color.”<sup>43</sup> Many already realised the dangerous implications of such concepts as “compensatory education.” Traditional liberalism and a majority of the civil rights

movement rejected the notion as the Myrdalian analysis of the problem, particularly the optimistic view that white Americans would eventually be reformed away from their prejudices that had kept black Americans down through the centuries, remained largely intact.

Throughout the early 1960s, faced with the rising tempo of civil rights protest, some began to question whether the existing provisions, based on the fair employment approach of the FEPCs initiated by Roosevelt, were adequate. Minnesota Senator Hubert H. Humphrey introduced a bill on August 1 1963, S.1937, which sought to “establish a broader and more comprehensive obligation of providing equal employment opportunities.” Humphrey’s bill “proceeded from the assumption that the fair employment approach of the state FEPCs had proved inadequate.”<sup>44</sup>

What was becoming apparent to all Americans shortly before the 1964 Civil Rights Act passed was that previous efforts had not yet been effective. The civil rights activism of the early 1960s, with its well of support and legions of volunteers, had proved both that existing civil rights efforts were inadequate and that doing nothing would simply aggravate the problem. The bill ran into opposition from Southerners who pointed out that the legislation would simply nationalise post-war Fair Employment Practices Committee (FEPC) acts passed by 25 states shortly after the war. Southern racial conservatives like John Stennis were able to point out that the pressure for a federal act came from the failure of these other approaches. He asked “Why should we compound and enlarge the error by expanding such a law to all States?”<sup>45</sup> However, due precisely to the objections of Southern Democrats, the Act failed to go any further than had the state FEPC laws, except in the sense that it prohibited discrimination on the basis

of sex in addition to race, color, national origin, and religion (ironically, this one addition came because of a failed spoiling tactic on the part of Representative Howard Smith of Virginia).

Title VII of the Act, dealing with employment, called for “affirmative action” by employers to ensure non-discrimination in hiring, firing and promotion. These requirements covered employers with one hundred or more employees a year after the law came into effect a year after its signing. It extended the regulations to those with twenty-five or more after July 2 1967. In the proceedings leading up to the bill’s passage, Southern Democrats objected to the potential for forcing firms to hire quotas of African-Americans thus negating union seniority rights. The leadership of the AFL-CIO denied that this would be the result of the Act. The Act did not require abrogation of seniority rights in order to create black employment, they insisted, nor could the Equal Employment Opportunities Commission (EEOC), the main body responsible for overseeing the implementation of the Act, derive such a requirement from the language of the Act. However, to blunt the Southern opposition, three provisos were included within the Act. 703(h) allowed employers to continue with a “bona fide seniority or merit system” and 706(g), by disallowing the court from requiring hiring, reinstatement, advancement, etc. of employees for reasons “other than discrimination on account of race, color, religion, sex or national origin,” implied that reasons of racial balance would not be legitimate. 703(j) was the most clear in its intentions, inveighing against “preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance

which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed.”<sup>46</sup>

It is clear from the debate surrounding the passage of the 1964 Act that the use of quotas, while a possibility, had no sponsors amongst even the most liberal congressmen and women. Hubert Humphrey insisted that “nothing in it [the Act, at that stage a Bill] will give any power to the Commission or to any court to require hiring, firing or promotion of employees to meet a racial quota, or to achieve a certain racial balance.”<sup>47</sup> Senator Joseph Clark, one of the floor managers of the bill, assured his colleagues that “nothing in this bill will interfere with merit hiring or merit promotion.”<sup>48</sup> Perhaps the most sympathetic views of quotas at the time came from a conservative, and one who would later attack quotas as an abrogation of the 1964 Act. Alexander Bickel, considering the “benevolent quota,” admitted in 1962 that: “If it wishes to go beyond ineffectual removal of legal bars to integration, the State or the Federal government may have to legislate some degree of controlled segregation.”<sup>49</sup> Mainstream liberals, at this time, did not consider the use of quotas as legitimate in any circumstance. When Franklin Delano Roosevelt, Jr., the Chairman of the Equal Employment Opportunities Commission (EEOC), also created by the Civil Rights Act of 1964, was asked in January 1966 about the possibility of quotas, he replied: “It is wrong even to talk about quota systems.”<sup>50</sup>

The thinking behind the 1964 Act was that it should be more exemplary and symbolic than strictly legislative. The objections made by Southern Democrats - that under the provisions of the Act, no precise definition of what constituted employment discrimination existed – were brushed aside rather than tackled head on. Liberals hoped

that the mere appearance of civil rights legislation would induce employers to hire blacks and that the process would snowball until African-Americans were represented at the same level in employment as they were in the American population. The provisos demanded by Southerners and some Republicans caused little consternation amongst the liberal sponsors of the bill except in that they were barriers to its passage. The AFL-CIO never seriously worried that it might be adversely affected by the legislation and argued against the need for the provisos. The 1964 Civil Rights Act, though it raised the profile of affirmative action, did not change its definition.

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<sup>1</sup> Nearly all observers reach a similar conclusion on this. See Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960-1972* (Oxford University Press, 1990), 457; John Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (London: University of Chicago Press, 1996), 6; Niclaus Mills in the introduction to Niclaus Mills, ed., *Debating Affirmative Action, Race, Gender, Ethnicity and the Politics of Inclusion* (New York: Delta, 1994), 4-18, 5; and Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (London: W.W. Norton and Co., 1996), 118-120.

<sup>2</sup> See *Equal Economic Opportunity: A Report by the President's Committee on Government Contract Compliance*, (Washington DC: US GPO, January 16 1953). This report fails to get any mention at all in *Five Years of Progress, 1953-1958: A Report to President Eisenhower by the President's Committee on Government Contracts* (Washington, DC: US GPO, 1958).

<sup>3</sup> 'NIXON BROADCASTS ON JOB DISCRIMINATION,' Press Release of the Conference on Equal Job Opportunity, Sponsored by the President's Committee on Government Contracts, held October 25 1955, Washington DC, Box No. 4, Entry 12. Records of the Committee on Government Contract Compliance: RG325, NARA.

<sup>4</sup> Unsigned letter headed "The President's Committee on Government Contract Compliance", no date, *Final Report of the Committee and Related Working Papers 1952-1953*, Copies of Letters Sent to Agency Heads and Private Persons by the Executive Director of the Committee, April 18, 1952 - May 29, 1953, Entry 12, Box No. 1, RG325 Records of the Committee on Government Contract Compliance, NARA.

<sup>5</sup> The Supreme Court had agreed on this concept earlier. The National Railway Act, which was intended to prohibit discrimination against union membership, was interpreted by the Supreme Court to mean discrimination against an individual for his race, creed, or color. *Steele v. Louisville & Nashville R.R. Co.*, 323 US 192 (1944) decided that discrimination within the act included denial of promotions and segregation which carries with it inequality of participation in union affairs. See "The Administration of the Non-Discrimination Requirements in Government Contracts," prepared by Dept. of Labor, October 1952, Procedures for Processing Complaints and Violations 1-33, Final Report of the Committee and Related Working Papers 1952-1953 Entry 12, Box No. 1, RG325 Records of the Committee on Government Contract Compliance, NARA.

<sup>6</sup> Andrew Edmund Kersten, *Race, Jobs and the War: The FEPC in the Midwest, 1941-46* (Chicago: University of Illinois Press, 2000), 123.

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<sup>7</sup> Final Report of the Committee and Related Working Papers 1952-1953, Box No. 3, Entry 12, RG325 Records of the Committee on Government Contract Compliance, NARA. The "final report" was not really final. The published version omits this reference.

<sup>8</sup> "Equality of Opportunity: The Right to Work" - A Report by the President's Committee on Government Contract Compliance, December 1952, Box No. 3, Entry 12, RG325 Records of the Committee on Government Contract Compliance, NARA.

<sup>9</sup> *The Crisis*, Vol. 57, No. 2 (February 1950), 73-76.

<sup>10</sup> The President's Committee on Government Employment Policy, *Some Questions and Answers on the Non-Discrimination Policy of the Federal Government* (Washington, DC: US GPO, 1955).

<sup>11</sup> *Hughes v. Superior Court* 339 US460 (1950), cited in James E. Jones, Jr., "The Bugaboo of Employment Quotas," *Wisconsin Law Review* 1970, 341-403, 378.

<sup>12</sup> Paul D. Moreno, *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America 1933-1972* (London: Louisiana State University Press, 1997), 93. See pages 90-97 for a general discussion of the case.

<sup>13</sup> William H. Chafe, *The Unfinished Journey: America since World War II* (New York: Oxford University Press, 1986), 163.

<sup>14</sup> *Pattern for Progress: Final Report to President Eisenhower from the Committee on Government Contracts* (Washington DC: US GPO, 1960).

<sup>15</sup> See Martin Luther King, *Why We Can't Wait* (New York: Harper & Row, 1963).

<sup>16</sup> Moreno, *From Direct Action to Affirmative Action*, 185. Skrentny agrees with this point, citing "valuable evidence that it is the logic of administrative pragmatism which led to affirmative action principles and building blocks, before the development of the civil rights movement, before the racial crisis in the cities, before the rise of militant black groups and theories of compensatory preferences... In the early 1950s, this technical logic of administration pragmatism led to a simple conclusion: Choose race consciousness and effectiveness, or choose color-blindness and failure." Skrentny, *Ironies of Affirmative Action*, 117.

<sup>17</sup> Moreno, *From direct Action to Affirmative Action*, 132.

<sup>18</sup> *Pattern for Progress: Final Report to President Eisenhower from the Committee on Government Contracts* (Washington DC: US GPO, 1960), 14.

<sup>19</sup> Richard P. Nathan, *Jobs and Civil Rights: The Role of the Federal Government in Promoting Equal Opportunities in Employment and Training* (United States Civil Rights Commission Clearinghouse Publication by the Brookings Institution, April 1969), 91. Subsequent Civil Rights Commission Reports, however, denied that any debarments or cancellations had taken place up until the 1970s. See, for example, the Civil Rights Commission's *The Federal Civil Rights Effort: Seven Months Later* (Washington, DC: US GPO, May 1971), 18.

<sup>20</sup> The PCEEO did break new administrative ground in that it oversaw the enforcement efforts of other agencies who were often unwilling to jeopardise close relationships with their contractors. Skrentny contradicts Nathan's contention, claiming that the PCEEO did not issue any penalties. See *Ironies of Affirmative Action*, 114.

<sup>21</sup> *The Administration of the Non-Discrimination Requirements in Government Contracts*, prepared by Dept. of Labor, October 1952, *Interim Report* of October 8 1952 (not released), folder marked "Final Report," RG325 Records of the Committee on Government Contract Compliance, NARA. Skrentny makes a similar point: "Throughout the 1950s and 1960s, agencies in search of a useful tool for fighting discrimination were continually led to the affirmative action approach, monitoring numbers and percentages of African-Americans hired as a measure of discrimination. What is interesting is that this 'discovery' had to be made time and time again in the years before EEOC was established, attesting to the extent to which the color-blind model was taken for granted." (Skrentny, *Ironies of Affirmative Action*, 115).

<sup>22</sup> *Service to Minority Groups*, US Department of Labor Employment Office Training Program: Instructor's Guide, December 1951.

<sup>23</sup> *Equality of Opportunity: The Right to Work*, A Report by the President's Committee on Government Contract Compliance, December 1952, folder labelled "Equality of Opportunity: The Right to Work," Box No. 3, Entry 12, Records of the Committee on Government Contract Compliance, NARA. Nixon warned businessmen to adopt affirmative action (then termed non-discriminatory) policies before they were made mandatory. See "NIXON BROADCASTS ON JOB DISCRIMINATION" (on 10/23/55), Press Release of

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the Conference on Equal Job Opportunity, Sponsored by the President's Committee on Government Contracts, held October 25 1955, Washington DC.

<sup>24</sup> *Equality of Opportunity: The Right to Work*, A Report by the President's Committee on Government Contract Compliance, December 1952, folder entitled Equality of Opportunity: The Right to Work, Box No. 3: Entry 12, Records of the Committee on Government Contract Compliance, NARA.

<sup>25</sup> Letter from Durward V. Sandifer, Acting Assistant Secretary for United Nations Affairs, to Robert Granville, August 22, 1952, folder labelled "Final Report," Box 2 Entry 12, RG325 Records of the Committee on Government Contract Compliance, NARA.

<sup>26</sup> Oliver Cox, *Caste, Class and Race: A Study in Social Dynamics* (New York: Doubleday, 1948), 531. Cox devoted an entire section of his book to attacking Myrdal in what was clearly the most effective contemporary critique. See 509-538.

<sup>27</sup> Most modern-day Myrdal critics often decline to cite Aptheker's 1946 book, *The Negro People in America: A Critique of Gunnar Myrdal's An American Dilemma*, (Kraus Reprint: New York, 1977). They cite instead black novelist Ralph Ellison, who voiced these same criticisms at the time in an essay which remained unpublished for some years, a fact that only underlines the omniscience of the Myrdalian model at the time of publication. Ellison, echoing Aptheker's primary point, asked, "can a people...live and develop over three hundred years simply by reacting?" Ralph Ellison, *Shadow and Act* (Signet Books: New York, 1966), 360.

<sup>28</sup> cited in David W. Southern, *Gunnar Myrdal and Black-White Relations: The Use and Abuse of An American Dilemma, 1944-1969* (London: Louisiana University Press, 1987), 218.

<sup>29</sup> Talcott Parsons, "Certain Primary Sources and Patterns of Aggression in the Social Structure of the Western World," *Essays in Sociological Theory* (Free Press: New York, 1964), 308, 309. Thomas F. Gossett, *Race: The History of an Idea in America* (Harper and Brothers: New York, 1964) is also useful in fleshing out this point.

<sup>30</sup> Cited in Ellen Herman, *The Romance of American Psychology: Political Culture in the Age of Experts* (London: University of California Press, 1995), 190.

<sup>31</sup> Gordon W. Allport, *The Nature Of Prejudice* (Reading, MA: Addison-Wesley, 1954).

<sup>32</sup> Walter A. Jackson "White Intellectuals and Civil Rights," Brian Ward and Tony Badger, eds., *Martin Luther King and the Making of the Civil Rights Movement* (Basingstoke: Macmillan, 1995), 96-114, 99.

<sup>33</sup> Martin Luther King constantly hoped through his non-violent tactics to prick the liberal conscience. In an address to the national Press Club in Washington, DC on July 19, 1962, he exclaimed: "We feel that we are the conscience of America - we are its troubled soul - we will continue to insist that right be done because both God's will and the heritage of our nation speak through our echoing demands." David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference, 1955-1968* (New York: William Morrow and Co., 1986), 196. See also Adam Fairclough, *To Redeem The Soul Of America: The Southern Christian Leadership Conference and Martin Luther King, Jr.* (Athens, GA: University of Georgia Press, 1987). The NAACP followed a legalistic route toward desegregation, belying its belief in staying within the system. For background, see Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (Chapel Hill ; London : University of North Carolina Press, 1987) and Minnie Finch, *The NAACP: Its Fight For Justice* (London : Scarecrow, 1981). The Congress of Racial Equality (CORE) employed different tactics but, in the 1940s and 1950s, dedicated itself toward working within the system. See August Meier and Elliott Rudwick, *CORE: A Study in the Civil Rights Movement, 1942-1968* (New York: Oxford University Press, 1973).

<sup>34</sup> A good history of these organisations and the people within them is contained in Linda Reed's *Simple Decency and Common Sense: The Southern Conference Movement, 1938-1963* (Indianapolis, IN: Indiana University Press, 1991).

<sup>35</sup> Paul Jacobs, "The NAACP's New Direction," *New Republic*, (July 16 1956), 9-11.

<sup>36</sup> "Moderates and Militants," Benjamin Muse (Virginia State Senator) v. Thurgood Marshall, *New Republic*, (April 2 1956). 8-10. See also "Negroes on Southern Campuses: What the Editors of Six College Newspapers in the South think about Desegregation," *New Republic*, (February 27 1956), 11-13.

<sup>37</sup> Editorial in *Liberation*, (August 1964), 4.

<sup>38</sup> Loren Miller was the California NAACP Vice President and a black newspaper owner. Loren Miller, "Farewell to the Liberals: A Negro View," *The Nation*, (Oct 20 1962), 3-4.

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- <sup>39</sup> Harry McPherson *A Political Education* (Boston, MA: Houghton Mifflin Co., 1988), 142.
- <sup>40</sup> Jackson, "White Intellectuals and Civil Rights", Brian Ward and Tony Badger, eds., *Martin Luther King and the Making of the Civil Rights Movement* (Basingstoke: Macmillan, 1995), 98.
- <sup>41</sup> Milton Friedman "Capitalism and Freedom", Felix Morley, ed., *Essays on Individualism*, (Philadelphia, PA: University of Pennsylvania Press, 1958) 180. Many other examples of this confidence can be found, although, if race relations proved to be as unproblematic as Friedman implied, there would be little reason to write about them. William Carleton chastised Southerners for running counter to the logic of the market: "The technological revolution is literally forcing Americans to resolve their racial dilemmas...(a) fluid and dynamic industrial society requires more egalitarian society." [William G. Carleton, "The Second Reconstruction: An Analysis from the Deep South," *Antioch Review*, (Summer 1958), Vol. XVIII, 171-180, 174]. J. Milton Yinger and George E. Simpson answer the question they rhetorically ask in the title of their piece, "Can Segregation Survive in an Industrial Society?" with a resounding "no": "Urbanization, the increase in industrial jobs with hourly pay rates, the beginnings of unionization, the diversification of jobs for Negroes, the growth in literacy and awareness of democratic values, the sharp increase in the size of the urban middle class, a growing integration of the national economy - these and other forces are changing the pattern of race relations in all parts of the country." [J. Milton Yinger and George E. Simpson, "Can Segregation Survive in Industrial Society?" *Antioch Review*, (Spring 1958), Vol. XVIII, 10-20, 16.]
- <sup>42</sup> Herbert Hill, whom Carl Brauer says was friendly with liberal Republicans, denounced Plans for Progress as "one of the great phonies of the Kennedy administration's civil rights program." Carl M. Brauer, *John F. Kennedy and the Second Reconstruction*, (New York: Columbia University Press, 1977), 149. For Martin Luther King's reaction, see Moreno, *From Direct Action to Affirmative Action*, 191-194.
- <sup>43</sup> Cited in Graham, *The Civil Rights Era*, 106. For a useful discussion of the issue of quotas during Kennedy's time, see Graham, *The Civil Rights Era*, 100-120.
- <sup>44</sup> Moreno, *From Direct Action to Affirmative Action*, 205-206.
- <sup>45</sup> Cited in Moreno, *From Direct Action to Affirmative Action*, 215.
- <sup>46</sup> See Appendix 1.
- <sup>47</sup> Cited in *Congressional Record (CR)*, 91<sup>st</sup> Congress, Vol. 115, 39965.
- <sup>48</sup> *CR*, Volume 110, 88<sup>th</sup> Congress, 7218.
- <sup>49</sup> Alexander Bickell, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York: Bobbs-Merrill Co., Inc., 1962), 65. It should be added that Bickell also called attention to the dangers of quotas: "But it is not inconceivable that a benevolent quota, like token integration, may be grounded in a realistic racism, which desires to continue as much compulsory segregation as the authorities can be brought to tolerate. Very occasionally, the racist motive may be provable. For the most part, it can only be surmised." (60).
- <sup>50</sup> *A Report on the 1966 Plans for Progress Fourth National Conference*, held at the Washington Hilton Hotel on January 24-25, 1966 (Washington DC: GPO, 1966), 36.



## Chapter 3

### THE END OF THE MYRDALIAN PARADIGM

As protests in the 1960s came to be more and more insistent, the liberal consensus on race showed signs of coming apart. In particular, blacks faced with the reality of lack of changes in their immediate environments, North and South, became disenchanted with liberal promises. James Baldwin stated in 1962 that Negroes “twenty years younger than I don’t believe in liberals at all.”<sup>1</sup> Loren Miller observed the differences between blacks and liberals in approach: “The liberal sees ‘both sides’ of the issue: the force of the Negro’s constitutional argument and the existence of customs, sometimes gelled into law, that justify the gradualist approach. He is impatient with ‘extremists on both sides.’” However, “every civil rights victory adds to the Negro’s intransigence.” Miller concluded sombrely that “(t)he middle ground on which the traditional liberal has taken his stand is being cut from beneath him.”<sup>2</sup>

Soon after the protests began, intellectuals began questioning some of the Myrdalian precepts. In the early 1960s in the journal *Social Forces*, several correspondents tested key Myrdal concepts like the “rank order of discrimination,” whereby Myrdal ranked the social importance to both white and blacks of various aspects of discrimination and by suggesting that the problem of discrimination may be more multifaceted than simply a “moral” issue. (The order was listed by Myrdal as 1. Intermarriage and sexual intercourse, 2. Personal relations - drinking, dancing, etc., 3. schools, churches, 4. political disenfranchisement, 5. courts police, etc., 6. land, credit, jobs.)<sup>3</sup>

One of the greatest challenges to Myrdal's rosy picture of the future of black-white relations in the United States came from the pen of journalist Charles E. Silberman in 1964. *Crisis in Black and White* declared that "what we are discovering, in short, is that the United States - all of it, North as well as South, West as well as East - is a racist society in a sense and to a degree that we have refused so far to admit, much less face."<sup>4</sup> In other words, Myrdal had concentrated on the South as the source of the problem but in the North, too, pervasive racism had been found to exist. Silberman felt that Myrdal's optimism that American whites simply had to divest themselves of outmoded beliefs in the inferiority of blacks could not still be countenanced. The timing was, of course, important. By 1964 the racial crisis appeared much more serious than it had in 1962 or, for that matter, at any time since the Detroit race riot of 1943.

Silberman had already written a provocative article in *Fortune* magazine that appeared in September 1963. In it he suggested, in alarmist tones, that African-Americans were becoming "increasingly intolerant of 'moderation,' and the poor, in particular, are contemptuous of the doctrine of nonviolence that has dominated the struggle so far." He noted that within a single week, Martin Luther King was pelted with eggs in Harlem, and Alabama activist James Meredith was publicly rebuked for being a "moderate." He then suggested that businessmen adopt "positive discrimination," implying that the cost for business would be less than the "cost to the community of racial violence." "Executives can be expected to be attacked from both sides," he warned. "(T)hey will need all the political art they can muster to persuade white employees that 'reverse discrimination' is socially necessary and for the greater good." These arguments,

though they stopped short of calling for government-enforced affirmative action, connected the issue of affirmative action with the threat of racial violence.<sup>5</sup>

Intellectuals, struck by the pressing need of the situation, were caught between advocating racial preferences and defending the existing liberal institutions. They essentially ran into the same problems that professionals in the Committee on Government Contract Compliance and Eisenhower's Contract Compliance committee had some ten years earlier. At the first of two *Daedalus* conferences on the Negro in America in April 1964, "(t)he participants all agreed that the situation of Negro Americans required preferential treatment, but they were very unclear as to how this could be rationalised in traditional political rhetoric."<sup>6</sup> Emphasising equality and in particular the formulation of "equality of results," Moynihan hoped to make preferential treatment a less bitter pill to swallow. Citing Bayard Rustin, he warned: "The principal challenge of the next phase of the Negro revolution is to make certain that equality of results will now follow. If we do not, there will be no social peace in the United States for generations."<sup>7</sup>

The overall belief that American society was headed almost inexorably towards racial equality, though perhaps weakened by this stage, still remained. So did the idea that lack of racial progress was entirely a problem affecting individual whites. Faith and hope, however, had replaced certainty in the minds of many both within and outside the policy elite. Liberal authorities, at this point, sought to prop up the institutions rather than to achieve results for African-Americans. None of the assumptions of the postwar era could be dropped for fear that the entire basis of liberal legitimacy might be eroded.<sup>8</sup>

## The Myrdalian Paradigm Reaffirmed

In 1964 nearly all liberals believed in the basic tenets of Myrdal – that a century long lag in morals within white America was ultimately responsible for racial inequality and that concerted action through liberal institutions was the best chance of alleviating the situation. Increasingly, however, they were torn between espousing a clearly moral cause that articulated liberal values and fear of instability. The call for government action became louder and louder. Liberals took the lead in urging the government to act decisively in favour of civil rights both to correct the moral lag and to decrease the possibilities of instability stemming from increasingly strident civil rights movement which, it was felt, was forcing the pace.

In many ways, rather than being forgotten or contradicted in the light of black unrest, Myrdal's analysis seemed to be vindicated. Throughout the 1950s, Americans had set aside the question of race, ignoring Myrdal's advice. Now, the American dilemma received the attention Myrdal thought it deserved. The crisis tipped the scales against the more *laissez-faire* attitude expressed by free-marketeers such as Friedman. The mass of extreme sentiments expressed over the civil rights issue frightened those that cleaved unto the "vital center," as did the civil rights movement's implicit rejection of the government as the sole locus for political action. No more would faith in the inexorable levelling powers of capitalism substitute for some government-led sort of action to create equality for black Americans. As Daniel C. Thompson wrote in January 1965, "(t)he Negro protest is, itself, a clear endorsement of the "American Creed" and a reaffirmation of the faith Negroes have in the democratic process."<sup>9</sup>

Martin Luther King and other civil rights leaders skilfully used the rhetorical language of the Creed to further their cause. They became an alternative moral leadership in the country, forcing the federal government to come decisively down on the side of integration. As King said in an address to the national Press Club in 1962: “We feel that we are the conscience of America - we are its troubled soul - we will continue to insist that right be done because both God’s will and the heritage of our nation speak through our echoing demands.”<sup>10</sup> In King’s 1963 publication, *Why We Can’t Wait*, King continued this theme yet also begins to ask that black problems be addressed in more immediate terms. In the end section of the book he discussed the issue of preferential treatment: “Whenever this issue of compensatory or preferential treatment for the Negro is raised, some of our friends recoil in horror. The Negro should be granted equality, they agree; but he should ask for nothing more.” King then raised the issue of the quota-based system in India, whereby those from the untouchable caste received preferential treatment in college places, approvingly. He noted that “In facing the new American dilemma, the relevant question is not: ‘What more does the Negro want?’ but rather: ‘How can we make the freedom real and substantial for our Negro citizens?’” King, however, was careful not to insist on quotas or any sort of preferential treatment. In line with most liberal thinking at the time, he simply wished to emphasise the urgency of the task and the effort needed to overcome black inequality.<sup>11</sup>

## Liberalism and Race: The Commentary Article

In an extraordinary roundtable discussion held by the liberal journal *Commentary* in 1964, Sidney Hook, Nathan Glazer, Gunnar Myrdal and James Baldwin debated the implications of the “Negro revolution” on liberal thought, showing how the question of civil rights exposed certain home truths about the post-war political establishment. Nathan Glazer effectively introduced the discussion with a précis of the problem:

The formal equality that prevails in this country has always been accompanied by a great order of inequality that doesn't apply only to Negroes, though Negroes are its worst victims. Traditionally, there have always been ways of dealing with this problem, and these ways have worked well enough to prevent ethnic and race wars from breaking out. One of them has been the provision of formal equality itself: formally we take no cognizance of differences among groups. Informally, however, cognizance has always been taken of these differences. We set up ‘balanced’ tickets, we make sure that different groups are represented on boards, commissions, and so on... In my opinion, this is a reasonable procedure. American democracy has always been a hazardous thing... The problem for Negroes is not that they have been outside the pattern but that they have been very badly off within it. And this too poses a challenge - a challenge of another sort - to liberalism.

The discussion quickly polarised between James Baldwin and the others. Baldwin, while not denying the efficacy of the Creed, insisted that a reconstitution of American democracy was necessary in order that African-Americans take their rightful place within it:

I might be perfectly willing to be one of the first Negroes accepted here or there; I might even be perfectly willing to wait ten years or a generation to be fitted into American civilization, or American society, if I really felt that I *could* be fitted into it as it now is, as its now constituted. But to my mind, you see, before one can really talk about the Negro problem in this country, one has got to talk about the white people's problem.

Though this point had been made by Myrdal in 1944, the context had changed enough to make the others nervous and defensive. The argument went back and forth between Baldwin's assertion that something fundamental was missing from the values of American society and the others' insistence that the treatment of blacks was an anomaly in an otherwise basically healthy system of values held by Americans. Sidney Hook insisted that things were basically going along the right track in terms of racial justice and that the "ethical principles" so vital to the Creed and to liberals' belief in their own legitimacy still represented the best hope of further progress:

And, if we examine the development of American society, we certainly can say we made *some* progress - not enough progress, to be sure, but progress nevertheless - by virtue of the extension of our ethical principles to institutional life. If we want to explain the progress that has been made in the last twenty years by minority groups in this country - not only the Negroes, but other groups as well - I believe we have to take into account the effect of our commitment to democracy, imperfect as it may be.

Myrdal insisted, as he had twenty years previously, that liberal institutions contained the solution within themselves but that they must be pressured in order to draw out the inherent equalising tendencies: "So what the Negroes have to rely upon in the end is that America *is* its institutions, and that the highest of these institutions will act when they come under pressure. And when they act, they will act according to certain principles, which, like Professor Hook, I call ethical." A point made by Glazer provides an interesting insight into the way liberals still viewed the issue of race, primarily as a contest between the enlightened few and the venial many: "Down below hardly anyone wants equality or is in favour of civil liberties. But up above they remember the American Creed. And the system works because there's enough power at the top to keep

it going. Is that progress? I don't know. But I think that's the way things work in America.”<sup>12</sup>

Perhaps better than any other contemporary source, the roundtable discussion conveys the onset of crisis that the issue of race created within liberal circles. At once, liberals became anxious about the implications of race for liberal institutions and more optimistic about the possibility of a solution because of the call to action provoked by the civil rights movement. The overall goals and perceptions of the problem did not change but the stakes were higher. Tilman C. Cothran wrote in 1965 that “(p)ossibly the most obvious consequence emerging from the demonstrations is the validation of Myrdal's hypothesis that the race problem in America - the contradiction between the American Creed and practice - is a problem in the minds of white people”<sup>13</sup> Until events proved otherwise, many analysts simply saw the race crisis as a clarion call for a more action to make the paradigm work. Few would give up on the ability of liberal institutions to resolve the issue of race until the late 1960s.

It is important to see the extent to which liberal intellectuals were taken by surprise by events in the early 1960s. Neither left nor right predicted the Freedom bus rides initiated by the Congress of Racial Equality (CORE) or the lunch-counter sit-ins begun in Greensboro, North Carolina. C. L. R. James, the West Indian Marxist, predicted in 1947 that US blacks would rise up simply because of their desperate plight in the South. Many other left-wingers, taking their cue from Soviet propaganda, predicted the same.<sup>14</sup> Liberal observers felt that progress was being made, obviating the need for protest. While national attention fixed upon events in the South, the issue had yet to metamorphasize into a national problem - few connections were drawn between the



problems faced in the South and those faced by coloured migrants in Northern cities. There was little comment about racial problems in the North; what there was normally assigned any difficulties to the unfamiliarity of recent Southern migrants to cities. When comments were made about the situation in the North, the problem was normally seen as a function of the speed with which southern blacks entered northern cities. William H. Whyte was entirely unabashed about urban blacks in a 1957 article and doubtless would have been upset at any comparison between his views and those of white Southerners:

But there is no denying that the proportion of Negroes in a neighborhood is a critical factor. Once the percentage of Negroes gets over a certain point - it seems to range between 10 and 20% - whites will generally move out...Negro leaders themselves are leaning towards the idea of quotas [i.e. *restricting* the numbers of Negroes] Quotas used to be a fighting word with them, but, privately at least, many see some form of quota as the only way the Negro middle-class can achieve integration.<sup>15</sup>

When the term “quotas” was used in the 1950s, it meant restricting the number of African Americans in a particular area to avoid “white flight!”

## The Onset of Crisis

In understanding the installation of quota-based policies, the overriding necessity for some sort of replacements for institutions originating during the New Deal and World War II becomes evident in the latter half of the 1960s. The crisis of the late 1960s indicates that nothing less than panic occurred amongst the authorities when many social groups, including African-Americans, Wallace supporters, and the youth of the nation, moved outside of the influence of the existing institutions. The issue of race created a crisis of authority or legitimation that extended beyond the black community.

At the same time that the first affirmative action programs had been initiated, government at various levels began to intervene directly in the lives of Americans in order to replace the influence of lost institutions, in order to regain influence and control. The advent of affirmative action as a system may be seen, as Graham noted, as “the unwitting cutting edge of a vast but quiet revolution in the nature of the American state itself” that increasingly regulated the lives of Americans.<sup>16</sup> This chapter will review the process of destruction of the Myrdalian paradigm, showing that the perspective outlined in the last chapter had to be significantly weakened before affirmative action measures could be implemented.

### Johnson raises the stakes

The stakes for Lyndon Johnson, who, more than anyone else, bore the responsibility for making democracy work for all Americans, were extremely high. In many ways, he personified the liberal belief that through enlightened liberal leadership and political will, any problem could be solved. Johnson aide Harry McPherson, who admits his former leader was “aggressive, scheming, vehement,” also noted that, “(i)ngenious and practical as he was, he was also ethically sentient; he wished to be thought a good man as well as a clever one.”<sup>17</sup> Johnson’s philosophy, perfectly in tune with the time, could (and has) been summed up by one word - “consensus”. Eric Goldman, another Johnson aide, indicated how Johnson’s political philosophy worked: “He was sure that the United States in the post-World War II period had wasted enormous energy and talent in essentially unnecessary clashes between labor and

management, urban interests and the rural regions, blacks and whites. He intended to find the formulas to smooth over these conflicts.”<sup>18</sup> He was fond of quoting the bible to emphasise the higher authority behind his negotiations: “Come, let us reason together.”<sup>19</sup>

As racial problems intensified, so did Johnson’s efforts to find common ground. According to Goldman, who was hired by Johnson in 1965, Johnson spoke more and more of his desire to create, in his own words, “a broad national consensus which can end obstruction and paralysis and can liberate the energies of the nation.”<sup>20</sup> He had some reason to be optimistic in the summer of 1965 – the 1964 Act and the 1965 Civil Rights Bill, which would ensure that no one would be denied the right to vote on the basis of colour, had also been great political unifiers, both inside the Democratic Party and in the nation as a whole. He was lauded by all the civil rights leaders of the time, to the extent that Martin Luther King initiated a march at the White House to *thank* Johnson for his support of voting rights for the residents of Washington, D.C.

On the other hand, as Johnson observed, his support was “like a Western river, broad but not deep.”<sup>21</sup> Even amongst the most loyal Democratic constituencies - civil rights leaders, trade unionists, church leaders and liberal intellectuals - signs of rising anxiety were apparent. He knew that both his own and his party’s fortunes rested upon the promise to a solution to the civil rights problem. Besides his losses in the South, Wallace had collected 34% of the votes cast in the Democratic primaries in April, 1964 including one third of the Wisconsin vote, 30 percent in Indiana and 43 percent in Maryland. In some steel districts in Indiana Wallace took 70 percent of the vote in the primary, indicating that, although he had the support of Labor leaders, his support amongst the “hardhats” was by no means safe.<sup>22</sup> Whereas the widely predicted “white

backlash” had not materialised in the election, a Harris survey published in May, 1965 showed “...apparent uneasiness of the American people over the current pace of civil rights progress. Six months ago, the public tended to feel that steady and sound progress was being registered. After recent events, the number who feel things are moving ‘too fast’ has risen rather sharply.”<sup>23</sup> Yet the civil rights movement continued to demand faster progress.

Johnson took a chance by speeding up civil rights reforms in an attempt to pre-empt the civil rights movement. In doing so, he altered the usual way that the government did business with interest groups by taking the initiative himself. John D. Pomfret, writing in the *New York Times*, noted the unusual manner that the initiatives contained in a then-obscure report entitled “The Negro Family: The Case for National Action” (later known as the Moynihan Report) took place:

The process by which the administration’s proposals to aid the Negro community are being evolved is not the usual one. Ordinarily, legislative proposals are put forward by pressure groups and the government acts as a sort of broker working out a politically feasible compromise between these groups.

In the present situation, the initiative so far has come largely from the administration, which is convinced that the problem and the need for fast action are so great that it must take the lead.<sup>24</sup>

*Plans for Progress* expressed the pragmatic hope that solutions might be found through rather than outside of the existing American institutions. By 1966 it included 317 of the country’s largest businesses, employing some 8.6 million employees. Historically, it is interesting in that it embodied the still-popular sentiment that business should lead efforts to create racial equality. Its purpose was to “provide leadership in bringing more Americans into fuller participation in the economy.” Franklin Roosevelt, Jr. told delegates to a Plans for Progress Conference in 1966 that “it is time that you get

into the school system, you participate in working up the curriculum, you participate in the remedial educational programs of the city school system... Whatever your obstacles [to affirmative action], you are in a better position to overcome them than Uncle Sam is.”<sup>25</sup>

Hobart Taylor, speaking at the same conference, encapsulated the perception of many in early 1966 that, whatever recent difficulties, “the institutions created by our forefathers have proved their viability and the ability to adapt to new conditions.” He said that the period since Plans for Progress had been created had been “an exceptional period morally and socially – one in which the American people picked up the American Dream, brushed it off, and put it to work for the whole country.” Implicit within Taylor’s prose is the conviction that American institutions might yet overcome the severe difficulties in which the heightened awareness of the issue of race had placed them. The writing was on the wall, however. At the same conference the rather-less sanguine speech of Dr. Samuel Proctor, the North East director of the Office of Economic Opportunities (OEO) told delegates that “Watts today is not a place anymore – it’s a state of mind, it’s a condition, it’s a mental milieu.” He characterised the young black mind of the time as thinking “you don’t have to touch this crumbling, decadent white society...” The boosters, by this stage, were clearly on the defensive.<sup>26</sup>

In May 1965, speaking at Howard University, Lyndon B. Johnson gave a speech that many credit with changing forever the definition of affirmative action:<sup>27</sup>

You do not take a person who, for years, has been hobbled by chains and liberate him, bringing him to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe you have been completely fair... We seek not just freedom but opportunity... not just equality as a right and a theory but equality as a fact and as a result.<sup>28</sup>

It is debatable whether “equality as a fact” and as a result represented any real step towards quota-based affirmative action. As Steven Steinberg suggests, this speech may have been a case of “semantic infiltration,” an example of selling relatively conservative measures with radical labels.<sup>29</sup> Furthermore, Johnson’s speech hardly went beyond Nixon’s threatening of businessmen in the 1950s.<sup>30</sup> However, it was surely significant that radical suggestions by civil rights activists, rejected out of hand by nearly all concerned two years earlier, were echoed by the most powerful man in the world, the personification of American democracy and the voice of the American people. The stakes for the government had been upped dramatically. However, the Howard speech may fairly be viewed as another cajoling effort by the Johnson administration aimed at convincing businessmen and other Americans that they must be committed to equal opportunities and must indicate their commitment with results. Realistically, no new definition of affirmative action emerged because of the distinction between equality as a right and equality as a fact. Johnson was simply announcing that affirmative action (at its most basic meaning of “positive action”) must augment the Civil Rights Act, expressing a sentiment that had been heard many times before, if not, perhaps, with the same urgency. But it is undeniable that the issue was now given a huge prominence that the civil rights leaders who first suggested some sort of preferential treatment should take place. The implication of the speech was also that the government would have to take positive action itself.

Skrentny points out that a moment of at least equal importance, less noticed, was when, in March 1966, EEO-1 forms were sent out to every employer contracted with the federal government requiring employers to keep track of the race of

every employee. This, however, marked the extent of Johnson's willingness to enforce the affirmative action he had called for at Howard University. Instead, Johnson pushed voluntaristic affirmative action programs such as the Plans for Progress harder. He gambled that American employers and employees, like many Southerners, could be cajoled and bullied into accepting black employees without any real force being applied. The EEO-1 forms would be yet another application of pressure to hire blacks.<sup>31</sup>

### Watts and the beginning of a period of policy stasis

On a hot August night, the Watts area of Los Angeles erupted into the worst racial violence since the 1943 Detroit race riot. It continued for six days, with over \$40m in property destroyed, over 1,000 injuries, 4,000 arrests made and 34 persons killed. Its biggest effect, however, was to sound the death-knell for the Myrdalian conception of race relations.

The racial crisis heralded by Watts brought the liberal paradigm crashing down. Liberals had succeeded in raising expectations for the American Creed and American institutions so high that they toppled from a great height. The institutions that Myrdal insisted were to lead Americans from their individualised prejudices now appeared to be riddled with racism. Johnson had inadvertently exacerbated the crisis by attempting to match the activism of the civil rights movement with executive action on civil rights. He had little choice. The civil rights movement managed to show how little the institution of law meant to Southern segregationists. The response of the Kennedy administration, fulfilled by Johnson, was to pass the 1964 and 1965 Civil Rights Acts

preventing any agency from administering unequal treatment on the basis of race, creed, colour or sex. Now Americans believed that the law and justice might finally be done for the Negro. Johnson believed that a process towards racial equality, now that the formal apparatus of oppression had been dismantled, had been initiated and would spread from the South into the ghettos in northern cities where many blacks watched the events in the South eagerly.

Watts shattered the beliefs held by most Americans that prejudice emanated from the treatment of blacks in the South alone. American institutions were sound, they had reasoned, but some outdated practices in the South, influencing some in the North, hampered the progress of the black race towards equality. The outlawing of these practices by the civil rights laws in the 1960s, most people hoped, would begin a process whereby racism in the United States would gradually disappear. Though some observers, including quite a few within the civil rights movement itself, began to suspect that racism might be embedded deeper within American society, at the time of the Watts riots most Americans thought that progress would soon be seen.

### **The White House Conference on Civil Rights**

The White House Conference on Civil Rights, planned before the riot but held as a “planning conference” with 250 delegates in November 1965 (the full conference, far less interesting than the planning conference, was held in May 1966), is interesting in its exposition of the problems of race relations at a time when one paradigm



was breaking up but before any new paradigm had been developed. Not surprisingly, rancour and confusion ruled.

Johnson had hoped that the conference would strengthen his liberal constituencies and re-establish presidential leadership over the civil rights movement. Those invited to the conference reflected the attempt to reconstruct “the coalition which staged the March on Washington, passed the Civil Rights Act, and laid the basis for the Johnson landslide - Negroes, trade unionists, liberals, and religious groups.”<sup>32</sup> In other words, Johnson wanted to use the conference to create the political consensus with which he had won the election. The consideration, therefore, was not so much to “solve” the problem, but to line up the political forces which could deliver a mandate to solve the problem. Watts, however, created splits in the civil rights movement, beset as it was by confusion and increasing hostility toward liberal politics, and within the liberal camp itself *before Vietnam became a divisive political issue*.

The conference is interesting first in that it gathered civil rights interests all under one roof for perhaps the first and last time. Martin Luther King, James Bevel, Andrew Young and Septima Clarke of the SCLC, John Lewis, Jesse Jackson and a young Marion Berry from SNCC, Herbert Hill, John Morsell and Stanley Branch of the NAACP, Whitney Young from the NUL, Floyd McKissick from CORE, poverty activist Saul Alinsky, writers Michael Harrington and Charles Silberman, sociologists Daniel Patrick Moynihan, Nathan Glazer, economist Leon Keyserling, future mayor of Los Angeles Tom Bradley, not to mention church, trade union and government leaders – all discussed race issues in the aftermath of Watts.<sup>33</sup>

Second, the structure of the conference gives a useful indication of what ways policymakers thought that racial problems could be resolved in the early 1960s. The fall conference was divided into seven panels - voting, education, "housing and neighborhood", the family, employment, health and welfare, and administration of justice. Myrdalian perspectives dominated the agenda and the incoming reports to the conference. The *First Report Of The Task Force On Education* dated 25 March 1965 concluded that "the obstacle of attitude" was the major obstacle to black equality. The report indicated that there was "a need for a program of "corrective" education, designed with special reference to racial, ethnic and cultural stereotypes which reflect the distorted cultural images." At the conference, delegates spoke of the need for equal education in order to get equality generally in society, voicing the principles behind the 1954 *Brown v. Board of Education* decision.<sup>34</sup>

The overall impression of the conference transcripts is of traffic running in all directions. Splits occurred between liberals and the civil rights movement but within both camps as well. Vivian W. Henderson, who was forced to sum up the session on jobs, admitted in a memorandum to Carl Holman in December 1965: "Virtually no recommendations came out of the panel on jobs to get at the problem of race relations in employment...(This is) in spite of the fact that considerable discussion was devoted to Title VII of the 1964 Civil Rights Act."<sup>35</sup> Even the subgroups of the conference became increasingly divided. Very few issues created a united front.<sup>36</sup> Within the NAACP, for example, Dr. Morsell in Panel VII argued strenuously for "racially-conscious" statistics - in other words, statistics based on race - whereas, when the same question was brought up in Panel IV, Clarence Laws, the NAACP representative, objected that "...this is the

very thing we have been fighting against.”<sup>37</sup> Herbert Hill, the NAACP labor spokesman, stated bluntly that “We are opposed to the keeping of such records.”<sup>38</sup>

Perhaps the most important aspect of this obscure conference, however, was the concern shown for the future of institutions in the aftermath of Watts. The implications for the whole post-war pattern of politics seemed serious to many at the conference. The preliminary report to Panel 1-A suggests that “the old basis for such (political) organisation - the ward clubhouse and the organisation of job-holders - is decaying or eliminated.” and called for a discussion on the psychological dimensions of citizenship.<sup>39</sup> Above all, discussion in the panel addressed the problem of black political participation. Another preliminary report warned that “...the concentration of Negroes in overcrowded areas decreases their political representation in city councils. This, in turn, reduces patronage posts and the exclusion from a fair share of the ‘spoils system’ discourages participation in ward organisation.” The same report went on to suggest that besides the danger of riot is the danger that non-participation of blacks in the electoral process will “deal a serious blow to effective government in the urban North.”<sup>40</sup> Another panel expressed the anxiety of liberals faced with segregated schools: “Public education - the public schools and colleges - are (sic) the basic social institutions designed to make real, vitalize and strengthen American democracy...Racially segregated schools... contribute to social instability and community pathology. They weaken the foundations of the American system of government.”<sup>41</sup>

## Two Reports Undermine Myrdal

Two reports initiated by the Federal Government emphasised that the existing analysis of the problem of black inequality was simply wrong and that a rethink of existing assumptions was needed. In 1966, the *Coleman Report* pulled the rug out from under the theory that, with desegregated schools, blacks could achieve equality. Kennedy came to power promising “to help equalize educational opportunity throughout the country.”<sup>42</sup> Education had been highlighted both as a means to bring African-Americans into the mainstream by better preparing them for job opportunities and also by lessening prejudice in whites through what Gordon Allport termed “contact theory” – the idea that white prejudice would dissipate if the races came into contact more often.

The Coleman Report had been called for by the 1964 Civil Rights Act. It addressed itself to four major questions: 1. How segregated are schoolchildren? 2. Do different schools offer equal educational opportunity? 3. How much do different children learn as measured by their performance on standardized achievement tests? 4. What are the possible relationships between students’ achievement and the kind of schools they attend? First, the report found that “when measured by that yardstick [1954 decision], American public education remains largely unequal in most regions of the country.” Twelve years after the *Brown* decision, there had been no change. Much more disturbing, however, was the finding that the success of children was determined *before* they attended school and was related to socio-economic background rather. This implied that efforts to desegregate schools, while desirable for many reasons, would not improve the life-chances for African-American children and would thus have little effect on black inequality, even in the long-term.<sup>43</sup>

On a practical level, too, school desegregation efforts ran into problems. Formal segregation could be outlawed but little progress had occurred in actually desegregating schools since the *Brown* decision. At the end of the decade Leon Panetta, a liberal California Republican appointed by HEW Secretary Robert Finch to head up the department's Office of Civil Rights, recalled a White House staff discussion about school desegregation soon after the Nixon team took over. A White House report they inherited concluded that "...after the most searching, intensive examination of the system we inherited for untying those knots [the knotty problems of school desegregation], we have concluded that it simply does not work. It has proven both ineffective and unfair. In short, it has failed."<sup>44</sup> The problem was exacerbated by the new focus on Northern school districts where de facto segregation seemed to create an even deeper division between blacks and whites than existed in the South.

Perhaps the most dramatic demonstration of the failure of all previous efforts by the Johnson administration to alleviate black inequality came in the riots in the summer of 1967. Black riots had occurred in 1966 in San Francisco, New York, Chicago, Cleveland, Atlanta and Grenada, Mississippi. In 1967 the two most damaging and destructive riots of the decade came in Newark, New Jersey and, a week later, in Detroit, where 43 people were killed and millions of dollars worth of damage was caused. Johnson told the International Association of Police Chiefs in Kansas City, Missouri in September of 1967 that "(m)uch can explain – but nothing can justify – the riots of 1967." He blamed the rioters for damaging "the respect and the accommodation among men on which a civilized society ultimately depends, and without which there can be no progress toward social justice." Johnson and many others at the time believed the riots

were provoked by “wretched, vulgar men, these poisonous propagandists” and set up a commission to investigate the causes of the riots. One of its briefs was to investigate the possibility that communist infiltrators were responsible.

## The Kerner Commission Reports

The resulting report of the riot commission was perhaps most important document for sealing the fate of the racial liberalism of Gunnar Myrdal. The *Report of the National Advisory Commission on Civil Disorders*, or Kerner Report, as it is more commonly known, appeared in 1968 with great fanfare. The commission, governed ostensibly by trusted Johnson deputy, Otto Kerner, but in reality manipulated by Mayor John Lindsay of New York, was published in March, 1968 with a print run of 30,000 but was sold out in three days.<sup>45</sup> It sold another 1.6m between March and June 1968.<sup>46</sup> The report turned out very differently than Johnson had imagined. Its impact was immediate. It rejected the idea that there had been any conspiracy involved. Its keynote theme was that “white racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II.” To appreciate the impact upon the hopes of racial liberalism, one only has to compare the oft-cited line at the beginning of the report, “our nation is moving toward two societies, one black, one white – separate and unequal,” to *Pravda*’s assessment of the American race riots of the 1960s. It observed in the riots “two Americas which are at war with each other - that of the rich and strong and that of the poor and humiliated, of whom the majority are Negroes.”<sup>47</sup> In

essence, American liberalism had admitted to all the accusations made by Soviet propaganda on racial issues heard since the beginning of the Cold War.

The most important conclusion of the report was that the Federal Government could not “continue its present failing efforts towards an integrated society.”<sup>48</sup> The institutions that had been championed by Myrdal and other liberals through to Lyndon Johnson were indicted: “...white society is deeply implicated in the ghetto. *White institutions created it, white institutions maintain it, and white society condones it.*”<sup>49</sup> In other words, instead of institutions correcting the sometimes-irrational proclivities of white citizens, the (white) institutions *created* a system whereby racism, latent or otherwise, within (white) individuals came to the surface. Though the report, in some ways, pure Myrdal in its assessment that the problems of black Americans lay on the white side of the equation, it came as an indictment of the democratic institutions, of the American Creed itself.

However, as well as its radical way of framing the question, aspects of the report are also fairly conservative by today's terms. It expressed in its recommendations the divisions between members of the commission over how to overcome the problems of black riots. It compromised, for instance, between attempts to destroy the ghettos and integrate black Americans within white suburbs, and those directed at enriching life in the ghettos, reflecting the concerns that had emerged at the White House Conference on Civil Rights planning session two years earlier. Many of its recommendations show that contentious issues were avoided; it was easier to recommend that the Federal Government create two million jobs over the next three years than to get agreement on job quotas for minorities. The report continually emphasised that the programmatic

suggestions would benefit poor whites as well as blacks, perhaps an indication that the Commission still saw the need to get white Americans behind civil rights efforts.

The report stepped back from an entirely pessimistic prognosis of the problem; such an analysis would, of course, obviate its existence. In bringing the tragic events to light, it was hoped that the problem might still be resolved. Also, a key continuum since *An American Dilemma* was published was that all whites, rather than just the authorities, were implicated. Despite superficial similarities of the Report's analysis with *Pravda*, there was no return to blaming the inequities of capitalism for the continuing oppression of the nation's black citizens. "This report is addressed to the institutions of government and to the conscience of the nation, but even more urgently, to the minds and hearts of each citizen. The responsibility for decisive action, never more clearly demanded in the history of the nation, rests on all of us."<sup>50</sup> Effectively, blame for the problem was shared out equally amongst all whites, from the chiefs of corporations to street-sweepers, from Washington bureaucrats to Montana ranchers. Michael Lipsky, co-author of a book about riot commissions published several years after the Kerner Commission, concluded that its research effort had allowed the Kerner Commission "to demand changes and advocate radical reforms without calling names... The problem is identified and the solutions are proposed. But no one is responsible, and no one is blamed, or urged to act, as an individual, any differently."<sup>51</sup> The Kerner Report continued Myrdal's theme that racial injustice was a moral problem in the hearts of white men even while it contradicted Myrdal's hope that liberal institutions would eventually lead Americans away from their racism. Such a continuum would prove vital to the ascension of the affirmative action paradigm later.



## Institutional Racism

Around the same time as the report, the theory of “institutional racism” was elucidated. Skrentny says of the importance of institutionalised racism that that “its most powerful role was as a legitimizing influence” for affirmative action<sup>52</sup>. However, as Steinberg has noted (and as has been noted earlier in this dissertation), the notion that American institutions were riddled with racism was not really new. Myrdal had documented how white institutions contributed to black oppression. What was new was the conception that *all of* white society was hopelessly racist. There was no question of progress; there was simply a blanket condemnation of white society. The same “white institutions” condemned in the Kerner report were condemned by Stokely Carmichael, the Student Nonviolent Coordinating Committee (SNCC) leader who leapt to fame with the cry of “black power” at a demonstration in 1966, and Charles Hamilton, a black political scientist in their 1967 publication, *Black Power*:

Racism is both overt and covert. It takes two, closely related forms: individual whites acting against individual blacks, and acts by the total white community against the black community. We call these individualized racism and institutional racism... The second type is less overt, far more subtle, less identifiable in terms of *specific* individuals committing the acts. But it is no less destructive of human life. The second type originates in the operation of established and respected forms in the society, and thus receives far less public condemnation than the first type.<sup>53</sup>

This book by Carmichael, already a controversial figure, and Hamilton quickly became a best seller. The theory of institutional racism now became discussed openly and rapidly became accepted amongst the liberal intelligentsia. The key difference between previous theories and the same themes that Nixon had highlighted in 1958 was in the hopelessness with which Carmichael and Hamilton viewed the problem. Whereas

those reports of the 1950s identified the propensity of institutions to, by habits and patterns rather than by conscious prejudice, discriminate against blacks, they hoped to alleviate the problem. Carmichael and Hamilton argued that blacks could never rely upon white institutions but had to organise themselves. This new conception clearly struck at the heart of the American Creed. Myrdal had enthused that “Americans believe in their own ability and in progress. They are at bottom moral optimists.”<sup>54</sup> The acceptance of institutional racism, if it did not completely contradict this belief, set back the prospects for its achievement and suggested that other ways of achieving this final goal must be contemplated.

On the one hand, the implication of failure was really aimed at American democratic institutions, despite the blanket condemnation of all of white society. Harking back to Myrdal, it had been up to these institutions to bring to bear “constant pressure on race prejudice, counteracting the natural tendency for it to spread and become more intense.” They had patently failed. In fact, the riots and the reaction by white Americans gave an indication that *racial problems within the United States could not be resolved within the existing democratic framework*. The prevalence of the theory of institutional racism in the late 1960s, in this sense, marked the end of an era when people imagined that black Americans could be incorporated into the American mainstream through government acting as an “educative force,” through democratic leadership.<sup>55</sup> On the other hand, however, the identification of the problem of black inequality as a white problem, rather than that of a particular social system, and the democratic insistence that the blame be laid equally throughout white society as a moral issue within the heart of each American, remained within Carmichael and Hamilton’s thesis. Certainly, the critique of

American race relations did not take the direction it had done in the 1930s when it was infused with anti-capitalism. Myrdal was at once contradicted and reaffirmed.

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<sup>1</sup> Cited in Loren Miller, "Farewell to the Liberals: A Negro View," *The Nation*, (October 20, 1962), 235-238, 235.

<sup>2</sup> Miller, "Farewell to the Liberals," 235. Miller also noted on the same page that "racial discrimination is becoming deeply rooted and institutionalized."

<sup>3</sup> Gunnar Myrdal, *An American Dilemma: the Negro Problem and American Democracy*, (Harper & Brothers Publishers: New York, 1944), 60.

<sup>4</sup> cited in Stephen Steinberg, *Turning Back: The Retreat from Racial Justice in American Thought and Social Policy* (Boston, MA: Beacon Press, 1995), 72.

<sup>5</sup> Charles E. Silberman, "The Businessman and the Negro," *Fortune*, (September 1963), 97-99, 184-194. Silberman also used the metaphor of the race here, foreshadowing its use by Lyndon Johnson in his famous Howard University address: "Negroes liken their position to that of a runner who is kept at the starting line until his opponents in the race are half-way to the finish line; merely 'freeing him' to run will not enable him to catch up."

<sup>6</sup> Lee Rainwater, William L. Yancey, *The Moynihan Report and the Politics of Controversy* (Boston, MA: M.I.T. Press, 1967), 32.

<sup>7</sup> U.S. Department of Labor, *The Negro Family: The Case for National Action*, (9) from the copy contained within Rainwater and Yancey, *The Moynihan report*, 3-4.

<sup>8</sup> See Steinberg, *Turning Back*, 63-64.

<sup>9</sup> Daniel C. Thompson, "The Rise of the Negro Protest" in *The Annals of the American Academy of Political and Social Science*, (January 1965), 18-29.

<sup>10</sup> King in an address to the national Press Club, July 19 1962, cited in David J. Garrow, *Bearing the Cross*, (William Morrow and Co.: New York, 1986), 13.

<sup>11</sup> Martin Luther King, Jr, *Why We Can't Wait* (New York, Signet Books, 1964), 134, 135, 140. King also used the race metaphor that Johnson used in his Howard University speech of the race (134).

<sup>12</sup> "Liberalism and the Negro: A Roundtable Discussion," James Baldwin, Nathan Glazer, Sidney Hook, Gunnar Myrdal, *Commentary*, Vol. 37, No. 3, (March 1964), 25-42.

<sup>13</sup> Tilman C. Cothran, "The Negro Protest Against Segregation in the South," *The Annals of the American Academy of Political and Social Science*, (January 1965), 18-29.

<sup>14</sup> Trotsky, Leon, *Leon Trotsky on Black Nationalism and Self-Determination* (New York: Pathfinder Press, 1978).

<sup>15</sup> William H. Whyte, "Are Cities Un-American?" *Fortune*, (September 1957), 123-128. Whyte compares the problems faced by blacks to those faced by other immigrants in previous times. Nor was he alone in his quest for quotas of this nature. Future radical leader of the poor Saul Alinsky, then a humble University of Chicago social science professor, called for residential quotas of blacks in testimony before the USCCR to resolve the conflict in Deerfield, Illinois (a prosperous suburb of Chicago) when the local population rose up against a development that promised to be multiracial. See Robert Gruenberg, "Dixie Hate in Yankee Suburb," *Nation* (January 16 1960), 47-60.

<sup>16</sup> Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960-1972* (Oxford University Press, 1990), 462.

<sup>17</sup> Harry McPherson, *McPherson, Harry A Political Education* (Boston, MA: Houghton Mifflin Co., 1988), 98.

<sup>18</sup> Eric F Goldman, *The Tragedy of Lyndon Johnson*, (McDonald: London, 1968), 170.

<sup>19</sup> Goldman, *The Tragedy of Lyndon Johnson*, 168. For general background on Johnson, see Robert Dallek, *Flawed Giant: Lyndon Johnson and His Times 1961-1973*, (New York : Oxford University Press, 1998).

<sup>20</sup> Goldman, *The Tragedy of Lyndon Johnson*, 53.

<sup>21</sup> Goldman, *The Tragedy of Lyndon Johnson*, 336.

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- <sup>22</sup> See Adam Fairclough, *To Redeem The Soul of America: the Southern Christian Leadership Conference and Martin Luther King, Jr.* (Athens, GA: University of Georgia Press, 1987), 195-197, Alan Matusow, *The Unraveling of America: A History of Liberalism in the 1960s* (New York: Harper & Row, 1984), 139.
- <sup>23</sup> Paul Sheatsley, "White Attitudes Towards the Negro," *Daedalus*, No. 1, (Winter 1966), 217-238, 234.
- <sup>24</sup> John D. Pomfret, "Drive For Renewed Negro Family Stability is Pressed By White House Panel", *New York Times*, July 19 1965, 15.
- <sup>25</sup> Remarks by Franklin Delano Roosevelt, Jr., Chairman of EEOC, *A Report on the 1966 Plans for Progress Fourth National Conference*, Washington Hilton Hotel, January 24-25, 1966, 36.
- <sup>26</sup> Dr. Samuel Proctor, remarks in the panel discussion, "The Needs Still Yet to be Met: Economic, Educational, Social" in *A Report on the 1966 Plans for Progress Fourth National Conference*, 12.
- <sup>27</sup> For example, see Robert Cook, *Sweet Land of Liberty? The African-American Struggle for Civil Rights in the Twentieth Century* (London: Longman, 1998).
- <sup>28</sup> Cited in Steinberg, *Turning Back*, 110, 111.
- <sup>29</sup> Steinberg, *Turning Back*, 113.
- <sup>30</sup> In *Five Years of Progress, 1953-1958: A Report to President Eisenhower by the President's Committee on Government Contracts*, (Washington DC: US GPO, 1958) it was reported that "In 1957 the Committee determined that additional measures were necessary. Vice President Nixon wrote to the head of each Government contracting agency asking him to adopt a firmer approach in the compliance work. He said: "The Committee believes that there should be even greater advances under the program in the future. Looking at that end, the Committee is of the opinion that where education, conciliation, mediation and persuasion do not bring about the proper results, a firmer approach should be adopted." "The agencies were asked:
1. To deny awards where there is convincing evidence of failure to comply with the nondiscrimination clause in previous contracts and
  2. To examine the employment practices of a firm not previously under contract by the Government to determine if it has a record indicating that it will be able to comply with the nondiscrimination clause." (24).
- <sup>31</sup> Though EEOC had no coercive powers, it attempted to negotiate between recalcitrant employers and civil rights activists. The Newport News shipping company settlement in March 1966 was a single success in a sea of failures. Here EEOC was joined with the departments of Justice, Labor and Defense to force Newport News to promote the majority of its black workers. Its vulnerable position (three-quarters of its business came from navy contracts) and the potential embarrassment at launching the *George Washington Carver* in the midst of a televised demonstration against racial injustice may have convinced the company to take the action. Johnson hoped to build on successes like this. See Chapter 8, "The Newport News Agreement," in Alfred Blumrosen, *Black Employment and the Law* (New Brunswick, NJ: Rutgers University Press, 1971), 328-407.
- <sup>32</sup> Bayard Rustin, "From Protest to Politics: The Future of the Civil Rights Movement", *Commentary* February 1965, Vol. 39, 25-31.
- <sup>33</sup> See Steven F. Lawson, ed., "Records of the White House Conference on Civil Rights (WHCCR), 1965-1966," *Civil Rights During the Johnson Administration 1963-1969* [microfilm], Part IV.
- <sup>34</sup> *First Report of the Task Force On Education* – 25 March 1966, Sylvester Papers, Reel 2, Records of the WHCCR.
- <sup>35</sup> Memo to Carl Holman from Vivian W. Henderson, dated December 29 1965, Sylvester Papers, Reel 2, Records of the WHCCR.
- <sup>36</sup> The exceptions to this were the representatives of Labor and the churches, but for different reasons. Labor was put on the defensive by civil rights organisations throughout the planning conference on issues relating to trade union restrictions. On other issues, labor leaders were unaccountable as, indeed, were church leaders who, of course, could not be voted out of office.
- <sup>37</sup> Transcript to Panel No. 4, "Health and Welfare", November 18 1965, 292, Planning Session Papers, Reel 7, Records of the WHCCR.
- <sup>38</sup> Transcripts of Panel No. 1-B, "Jobs," November 18 1965, 290, Planning Session Papers, Records of the WHCCR, transcript to Panel No. 4, "Health and Welfare", November 18 1965, 292, Planning Session Papers, Reel 6, Records of the WHCCR.

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- <sup>39</sup> Memorandum from J.Q. Wilson and H.D. Price to “White House Conference on Civil Rights”, dated November 3 1965, Sylvester Papers, Reel 5, Records of the WHCCR.
- <sup>40</sup> Memorandum from Sterling Tucker to Berl Bernhard, Harold Fleming, Carl Holman, Liz Drew, dated November 5 1965 3, Sylvester Papers, Reel 5, Records of the WHCCR.
- <sup>41</sup> Planning Session Agenda Paper on Education, p43, Sylvester Papers, Reel 5, Records of the WHCCR.
- <sup>42</sup> William Chafe, *The Unfinished Journey: America Since World War II* (New York: Oxford University Press, 1986), 193.
- <sup>43</sup> U.S. Department of Health, Education and Welfare, Office of Education, *Equality of Educational Opportunity* (Coleman Report), (US Government Printing Office: Washington, DC, 1966). The report observed that: “For most minority groups, then and most particularly the Negro, schools provide no opportunity at all for them to overcome this initial deficiency; in fact they fall farther behind the white majority in the development of several skills which are critical to making a living and participating fully in modern society.” (20).
- <sup>44</sup> Leon E. Panetta and Peter Gall, *Bring Us Together: The Nixon Team and Civil Rights* (J. B. Lippincott Company, New York, 1971), 191.
- <sup>45</sup> See Nicholas Lemann, *The Promised Land: The Great Black Migration and How it Changed America* (London: Macmillan, 1991). According to Lemann, Lindsay pre-empted the report by prevailing on the commission at the last minute to include a dramatic executive summary written by his staff, including the line: “two societies – separate and unequal...”
- <sup>46</sup> Ellen Herman, *The Romance of American Psychology: Political Culture in the Age of Experts* (London: University of California Press, 1995), 216.
- <sup>47</sup> John Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (London: University of Chicago Press, 1996), 99.
- <sup>48</sup> Tom Wicker, “Introduction” to the *Report of the National Advisory Commission on Civil Disorders* (hereafter the Kerner Commission Report) (New York: Bantam Books, 1968), vii.
- <sup>49</sup> Kerner Commission Report, 2.
- <sup>50</sup> Kerner Commission Report, 34.
- <sup>51</sup> Cited in Ellen Herman, *The Romance of American Psychology*, 213.
- <sup>52</sup> Skrentny, *Ironies of Affirmative Action*, 100.
- <sup>53</sup> Cited in Steinberg, *Turning Back*, 75.
- <sup>54</sup> Myrdal, *An American Dilemma*, 22.
- <sup>55</sup> See, for instance, Norman Vieira, “Racial Imbalance, Black Separatism and Permissible Classification by Race,” *Michigan Law Review*, Vol. 67 (June 1969), 1603-1618, 1613.

## Chapter 4

### THE STASIS OF GOVERNMENT CIVIL RIGHTS EFFORTS IN THE LATE 1960S

While historians concentrate on the pioneers who first propagated theories of institutional racism, it is possible to miss the confusion besetting administrators and policymakers during this period. Most continued along lines handed down to them until instructed otherwise. The most important precept contained in *An American Dilemma* – that white Americans might be persuaded to reform their attitudes towards blacks and thus alleviate the problem – survived in the minds of administrators until the late 1960s.<sup>1</sup> Some civil rights professionals analysed the problem in northern cities as essentially a transplanted Southern problem. They reasoned that black immigrants to the cities created overcrowding and thus unrest in the ghettos, leading to rioting. Such an analysis must have proved attractive for officials desperate to get a handle on the problem. A “Miss Bennet,” who listed herself as a federal government employee at the White House Conference on Civil Rights, told the conference: “You have in Watts, now, 1000 newly arriving illiterates from the rural South every month adding to that. I think we ought to take a little bit of time to talk about these people in the rural areas because they are going to prevent solutions to the problems.”<sup>2</sup> Miss Bennet’s solution was a massive plan to pastoralize the South in order to provide more adequate livings for rural blacks and thus keep them out of the cities where they created trouble. Such solutions, while appearing strange now, appeared as credible programs at the height of the racial crisis.<sup>3</sup>

As Alfred Blumrosen complained, the wheels of bureaucracy turned slowly, though, keeping in mind the implications of Miss Bennet's plan, one can be slightly more charitable towards bureaucrats when judging their hesitancy at implementing new plans. Many administrators were loath to give up the Myrdalian precept of "education, not enforcement" when it came to discrimination in employment:

This formula immobilized the agencies. The idea was that the law should not be enforced because it dealt with basic human motivations and attitudes. These attitudes could be corrected only by "education." But education was then defined to exclude enforcement of the law, despite a long history which has justified much law on the grounds of its deterrence or educational function.<sup>4</sup>

Blumrosen was indeed accurate regarding the immobilization of the agencies. In school desegregation cases, it was found that private sector actions in real-estate and home lending led to residential segregation that made school integration impossible. Busing between school districts became the favoured remedy of the courts but created a very messy and costly solution. Additionally, it ran up against concerted opposition from parents who, for racial motives or otherwise, objected to busing.

The so-called "open housing" programs fared no better. In July 1967 Housing and Urban Development (HUD) revised its tenant selection policy, eliminated ineffective free choice plans and substituted a plan based on "first come, first served" In summarizing its experience under the free choice system, HUD said: "for various reasons, such as the mores of the community, fear of reprisals, types of neighborhoods, inducement by Local Authority staff -- whether by subtle suggestion, manipulation, persuasion, or otherwise... such freedom of choice plans did not provide applicants with actual freedom of access to, or full availability of, housing in all projects and locations."<sup>5</sup> The enforcement mechanisms provided for HUD - generally complaint processing

through formal investigation and litigation initiated by individuals, according to the CRC report, “provide weak leverage because of their time-consuming and individualistic nature”<sup>6</sup>

Neither had other efforts been successful in lessening the gap between black and white Americans. The efforts at strengthening black communities through Community Action Projects and other experimental projects in the ghettos had also failed to make any ground. The Equal Employment Opportunities Commission could not be counted as a success. The number of cases successfully prosecuted emerged like the smallest of a set of Russian dolls from the other relevant statistics. From an initial 44 thousand charges reported to EEOC, 27 thousand were recommended for investigation, reasonable cause found for 17 thousand, conciliation was successful in less than eight thousand and, of the nine thousand cases remaining, only 900 were even brought to court! As EEOC chairman William H. Brown complained:

It can readily be seen that the existing law is seriously deficient... All that an intransigent respondent has to fear is the unlikely possibility that whomever he has discriminated against will take him to court. This has happened in less than 10 per cent of the cases where we found reasonable cause and attempts at conciliation were unsuccessful.<sup>7</sup>

When it came to contract compliance, officials still balked at the idea of forcing companies to comply with the conditions of the contract, not least because a useful working definition of “discrimination” that all contractors had foresworn remained elusive. Somewhat typical was the Allen-Bradley case. For the payroll period ending March 7 1968, the company had 6,869 employees, 32 of whom were black. There was an official, written company policy giving preference to relatives and friends of employees. Between April 1964 and October 1968, there were four meetings and three letters



exchanged between the government and Allen-Bradley. Neither the issues nor the attitude of the company changed. Nevertheless, four years passed before the company was formally notified in May 1968 that it was in noncompliance. After hearings, the Secretary of Labor ordered the company to “proceed immediately to attempt to agree on an appropriate program of affirmative action.” No affirmative action plan had yet been agreed by June 1969.<sup>8</sup>

A survey appearing at the time was damning of the government’s record in persuading companies that they needed to hire more African-Americans. Of the fifty states, 24 (47 percent) showed increases in black employment of 1 percent or less in the five year period (1962-67). Of these, 22 had no increase or decreased - including Florida, Texas, Massachusetts, Mississippi, New Jersey, West Virginia. Nearly one fifth of all black federal employees in 1967 worked in Washington DC (where only 11 percent of all federal employees worked). Most humiliating to Johnson, perhaps, was the spectacular failure of the high profile Plans for Progress program. A survey carried out by the President’s Council on Equal Opportunity (PCEO) indicated that by 1968 companies in the program had worse records of hiring African-Americans than the government contractors who were not in this preferred status and who had been lectured at by those in the program.<sup>9</sup> Edward C. Sylvester, the head of Johnson’s Office of Federal Contract Compliance Programs (OFCC) complained in March 1967 of the government’s equal employment programs, “there is too much carrot and not enough stick.”<sup>10</sup>

## Nixon's Holding Pattern

There is no question that when Nixon took office the crisis in authority had deepened considerably. In 1968 those who were still trying to downplay the nation's distress in the hope that it would go away could no longer ignore black rage or the undertow of Vietnam. On January 30 1968 the Viet Cong launched the Tet offensive, a surprise attack that, despite the fact that the Viet Cong suffered heavy losses, convinced many Americans that the Vietnam War could not be won. American casualties climbed throughout the year, equalling in the first six months the total for the whole of 1967. As many Americans began questioning the correctness of the assumptions with which they had grown up, the authority of Johnson and his administration suffered. Many began to link the Vietnam War with the racial crisis, seeing the war as the annihilation of a people because of their difference from the mainstream. On March 31, Johnson appeared on the nation's television screens to announce the scaling-down of the bombing of North Vietnam, adding to a surprised national audience that he would not be a candidate for re-election. When Dr. Martin Luther King was assassinated less than a week later, blacks rioted in 168 cities and towns. Thirty-four blacks and five whites died in the violence. Robert Kennedy was shot in June as he campaigned to be Democratic presidential candidate. Violence erupted again in August at the Democratic national convention in Chicago. However, it was protest about the Vietnam War that became the biggest worry for Nixon when he took office. This war, as Godfrey Hodgson observed, "became the organizing principle around which all the doubts and disillusionments of the years of

crisis since 1963, and all the deeper discontents hidden under the glossy surface of the confident years, coalesced into one great rebellion.”<sup>11</sup>

The crisis, relatively small from the perspective of today, meant, at the time, that the deepest fears of liberals appeared to be realised. As Doug McAdam observed, “(i)t would not seem an overstatement to argue that the level of open defiance of the established economic and political order was as great during this period as during any other in this country’s history, save the Civil War.”<sup>12</sup>

The more long-lasting effects of the crisis, though, were less physical than spiritual or moral. A pervasive self-doubt affected liberals at various different levels. The sense of moral failure occasionally developed into breastbeating and even (metaphoric) self-flagellation. Thus *Ramparts* magazine, a contemporary liberal publication, quoted James Baldwin: “White people cannot in the generality be taken as models of how to live. Rather the white man himself is in sore need of new standards” then added: “We agree.”<sup>13</sup> The Democratic Party, hitherto the political gathering point for civil rights liberals, appeared on the verge of collapse after the Chicago convention. A delegate told the audience in Chicago:

To an extent not matched since the turn of the century, events in 1968 have called into question the integrity of the convention system for nominating presidential candidates. Recent developments have put the future of the two-party system into serious jeopardy... The crisis of the Democratic Party is a genuine crisis for democracy in America and especially of the two-party system. Racial minorities, the poor, the young, members of the upper-middle class, and much of the lower-middle and working classes as well - all are seriously considering transferring their allegiance away from either of the two major parties...<sup>14</sup>

Nor was it simply Democrats who saw a crisis emerging. Elliot Richardson, who would replace Bob Finch as Nixon’s Secretary of Health, Education and Welfare, pontificated in 1967 about “...a new and potentially disastrous development

threatens us: the growing loss, by millions of Americans of their sense of purpose and identity.” He blamed the present administration for the debacle, not entirely surprising, given that he spoke to the Republican Ripon society. State Senator Jerris Leonard of Wisconsin, who took charge of the Civil Rights Division in the Justice Department of the Nixon administration, spoke of the crisis to the National, State, and Local Relations Subcommittee, National Republican Platform, on July 31 1968, pointing out its critical nature:

...I submit to you that it is really only been in the last dozen or twenty years that the individual citizen has become despondent over his inability to get a handhold on his government. ...While paying lip service to federalism and local government, we have established a monolithic centralism before which the individual feels powerless. His alternatives are membership in mass protest groups, or introverted withdrawal -- neither of which serve well the cause of democracy.<sup>15</sup>

Leonard indicated that the implications for government were severe:

To lift the urban crisis from our land will require profound adjustments throughout our social system, involving individual attitudes and commitments, the roles of public and private institutions, the assignment of priorities and resources, and, above all, national leadership that goes beyond the “politics as usual” of the past four years.<sup>16</sup>

Though both Richardson and Leonard could be counted as relatively liberal on many social issues, more mainstream Republican comment indicated that beneath the headline-grabbing condemnations of the Johnson administration’s alleged softness on crime and disorder, genuine worries about the future of political system pervaded both parties. According to one of the official publications for the 1968 Republican Convention, the crisis was seen in broad terms:

These factors indicate that the urban crisis is far more than civil disorders and unmet social needs; it is a crisis of confidence, of leadership and of human relationships that amounts to a depression of the national spirit. For just as the old indicators of progress are no longer valid, so also the customary responses,

whether they be the establishment of one or more Federal program [sic], the appointment of another blue-ribbon study Commission, or an after-the-riot plea for law and order, are woefully inadequate.<sup>17</sup>

Veteran newspaperman Walter Lippmann, who has been called the quintessential Washington insider, wrote in the *Washington Post* in 1968, just after the release of the Kerner Commission Report, that: “The dominant fact is the crumbling of that binding confidence in the Nation’s purposes and its future, which in normal times may be taken for granted. There is a disintegration of that hope, which is the inner genius of the American spirit, that men can solve their problems and that evils can be overcome.”<sup>18</sup> The National Committee for an Effective Congress, a bipartisan affair, noted in a report cited in the *New York Times* on December 26 1967, asserting that “‘malaise,’ ‘frustration,’ ‘alienation,’ ‘identity’ are now becoming part of the professional political vocabulary.” It summed up the period by stating that “America has experienced two internal crises in her history: the Civil War and the economic depression of the 1930’s. The country may now be on the brink of a third trauma, a depression in the national spirit.” On the extent of the crisis, if not on the causes or cures, there was broad agreement at the end of the 1960s.<sup>19</sup>

It is evident that, between 1944, when *An American Dilemma* was published, and 1969, when the Philadelphia plan came into effect, attitudes to issues of race had changed dramatically. The white side of the equation had been eclipsed by problems on the black side. The American democratic system, heralded by a large section of the intelligentsia after the war as a system that was easily perfectible if not already perfected, had been indicted for its inability to incorporate twenty million of its citizens by 1969. Racial progress by slow but sure changes in the attitudes of white Americans

towards their black fellow citizens – as prescribed by Myrdal – was no longer a realistic scenario. In many ways, white racism was now assumed to a permanent fact. This change of perspective affected policy decisions, especially in the area of civil rights. As political scientist Theodore Lowi termed it, federal policy now “became a matter of indemnifying damages rather than righting wrongs.”<sup>20</sup>

The role of the State in the question of racism changed entirely. In an article in the *Michigan Law Journal* in 1969, Norman Vieira noted that preferential treatment implied that the government no longer sought to reform white attitudes to blacks: “Blacks as well as whites may instinctively attribute the preferential treatment of a minority race to a low assessment of its capabilities. Racially predicated government action may thereby appear to confirm the folklore of racism...”<sup>21</sup> Government now became an *arbiter* between groups in a racially divided society rather than a *leader* in a society striving towards racial equality. In this way, the power elite, while they could not lead the country on the issue, created a new basis for their authority. Few challenged their position as arbiters in the relations between the races.

The process of destruction of the Myrdalian paradigm, while occasionally dramatic, took place over a number of years and in different ways. Because of its existence as a higher ideal, race relations professionals who dealt with a particular area found their experiences contradicted Myrdal’s perspectives but imagined that they were the exceptions to a still-valid general rule. It would be possible to illustrate aspects of continuity between the Myrdalian paradigm and the way race is understood today. Indeed, as many have pointed out, generations of African-Americans have grown up in ghettos that saw few changes despite the furore taking place on the pages of scholarly

journals and at academic conferences. Black earnings compared to those of whites have not changed dramatically since the late 1950s. However, the deleterious effect on other aspects of liberalism happened quicker.

The times called for a President who was not closely associated with the liberal programs and institutions of the 1960s. Only such a leader had the freedom to experiment with different programs. Nixon had the job of slowly extricating the issue of race from the democratic arena altogether. However, Nixon did not at first seriously consider overhauling race relations; his only remit was to “lower our voices,” to calm an inflamed situation. Initially, Nixon followed the civil rights efforts of the Johnson administration, hoping to effectively enforce the existing legislation in order to promote order and faith in the law. His initial choice for Secretary of HEW, Bob Finch, explained that “We didn’t need some new theory in the field of civil rights enforcement... the question became ‘How are we going to rationalise it?’”<sup>22</sup>

After four consecutive summers of serious rioting, there seemed little reason to think that the rioting would end. In 1969 it moved to the campuses. At Cornell, one hundred black students armed with rifles and shotguns occupied the student union. In October three hundred Weathermen (a revolutionary splinter group) raced through Chicago smashing windows and attacking police officers in an attempt to incite armed class struggle.<sup>23</sup> Between the beginning of the year and April 15, there were 8000 bombings and threats of bombings. In the 1969-70 academic year, 7200 young people arrested for violent acts on campus, double that during 1968-69. As Melvin Small observed, “(w)hatever legislative program the administration finally developed, the chief problem it faced in 1969 was the perception that the United States was coming apart at

the seams. The nation was awash in unprecedented political and racial violence and a perceived rise in criminality that made many Americans insecure, even in middle-class neighborhoods and homes.”<sup>24</sup>

A solidly establishment figure like Irwin Miller, Chief Executive Officer of Cummins Engine Company, member of the steering committee of the Urban coalition, President of the National Council of Churches, amongst other things, predicted ensuing social chaos and summed up the feelings of many: “Because of our new dependence on electric power, communications, and transportation arteries, a small dedicated group of men in each city could paralyze us. Alongside the opportunity there exist men and women who might easily be motivated to seize it. These are the men and women for whom this country does not work.”<sup>25</sup> Such alarmist sentiments were widespread in 1969.

## A Political Crisis

Conservatives galvanised their constituents by spreading panic about the perceived (and often very real) lack of law and order in American society. “Crime and violence, disregard of law and disrespect for authority, immorality and irresponsibility are on the rise,” one report exclaimed brightly at the Miami party conference in 1968.<sup>26</sup> “Rising crime rates and a series of major riots and civil disorders have left a trail of victims, both Negro and white, and have created an atmosphere of fear, alarm, mistrust and apprehension all across the country,” chimed in another. Nixon, not to be outdone by his Republican colleagues, topped the hyperbole stakes in speeches around the country. “The violence being threatened for this summer is more in the nature of a war than a riot.



A riot, by definition, is a spontaneous outburst. A war is subject to advance planning.”<sup>27</sup> Later, he warmed to the “war” descriptor for domestic violence. “The war in Asia is a limited one with limited means and limited goals. The war at home is a war for survival of a free society.”<sup>28</sup>

The Republicans had every reason to hype up the disorder, standing to benefit as they did from the fear and dissatisfaction existing in the population as a whole at the time. Their own party had been in crisis for some time. An interesting report entitled *Where the Votes Are* published in 1966 indicated the extent of the rot. In 1940 38 percent of American voters considered themselves regularly affiliated with the GOP. By 1950, 33 percent of the American population still affiliated themselves with the GOP. In 1960 the number dropped to 30 percent, in 1962, 28 percent and by 1964 only 25 percent of the population called themselves Republicans. Meanwhile, Democratic Party affiliations rose to over 50 percent and those who called themselves independents remained between 20 and 24 percent between 1940 and 1966. Party affiliation was at its weakest among voters in their early and middle twenties. Despite the report’s suggestion that its implications were of a “enormous opportunity,” the statistics were clearly gloomy reading for Republican officials.<sup>29</sup>

Nixon proposed compromises. On CBS Radio on June 27 1968, Nixon departed from the “law and order” theme with which he was attracting panicking white Americans:

Faced with epidemic disorder, one part of the answer is both to strengthen and to use the forces of law. But this by itself is not enough. If we are to restore domestic peace, we sooner or later must bring those who threaten it back within the system. What we need is not one leader, but many leaders; not one center of power, but many centers of power.

Every idea has its time. And the time is now for the idea of an expanded democracy, of moving government closer to the people, of breaking massive problems into manageable pieces. This is the way people can participate, they can be involved, their voices can be heard and heeded.

One of the first tasks of the next President should be to set in motion a searching fundamental appraisal of our whole structure of government - not only of our federal departments and agencies, but also of state and local government, and its relation to the Federal structure.

...I do think that as we make government more responsive, as we re-ignite trust and reestablish a sense of community, we can bring many back within the system.<sup>30</sup>

Several aspects of this speech stand out. First, some sort of measures to include the alienated within the system would be necessary that would accomplish the task of “breaking massive problems into manageable pieces.” No longer were the problems referred to (this speech, delivered in the month after the rioting following Martin Luther King’s assassination, obviously referred to rioting when it mentioned “epidemic disorder”) to be *resolved*, they were simply to be made more *manageable*. This allowed housing to be approached separately from education and employment to be addressed separately from voting rights. The whole emphasis on decentralization backed away from the idea that all these could be accomplished at once the idea that black Americans should be brought into the mainstream and opened the door to localised solutions like affirmative action quotas as the best way to proceed.

There is other evidence that Nixon had some grasp that the nature of the crisis and that more than immediate measures were needed. As Lowi observed in 1969, “(t)he crisis of the 1960’s is at bottom a political crisis, a crisis of political authority,” a crisis, Lowi later stated, that was “more serious than any other in the twentieth century:<sup>31</sup> “The institutions of the state have become implicated. There is serious doubt about

efficacy and justice in the agencies of government, the process of policy-making, leadership selection, and the implementation of decisions... The *modus operandi* of power must be called into question.”<sup>32</sup> As Dan Carter reminded readers, that more than 13 percent of the electorate that ultimately supported George Wallace indicated that alienation from the American political system extended far beyond the ghettos. The destruction of the New Deal alliances formed in the 1930s threw many political and social assumptions into question. Once in office, Nixon could no longer simply criticise the record of the Democrats. He would have to deal with the situation himself.

In the White House, Nixon acted to restore public order and stability had to be regained. In White House speechwriter Ray Price’s attempt at a poetic phrase, Nixon wished to “lay a hand on the nation’s fevered brow.”<sup>33</sup> Outside the administration, the pundits agreed. Political pundits Richard Scammon and Ben Wattenberg referred in a book published in 1970 to “Nixon’s go-slow, antifrenetic style of government.”<sup>34</sup> Left-wing editor of *Dissent* Irving Howe told the National Black Economic Development Conference held at the end of April 1969 that: “The main goal of the Nixon Administration is the restoration of social order - social peace - in the United States. How this is to be achieved - by blunt oppression, meliorist legislation, or both - the Nixon people don’t yet know.”<sup>35</sup>

Nixon carried the battle to the campuses of the nation in 1969. An historical curiosity, given the apolitical nature of US campuses today, is the extent to which Nixon and members of his administration worried about campus unrest. But the question for the Nixon team in 1969 “in its simplest form, was whether rule by mob would supplant rule by the democratic system.”<sup>36</sup> Throughout 1969, a constant theme was

the spectre of disorder and chaos. In a statement on campus disorders issued on March 22 1969, Nixon warned in stark terms of the danger: "The process is altogether too familiar to those who would survey the wreckage of history: assault and counterassault, one extreme leading the opposite extreme, the voices of reason and calm discredited. As Yeats foresaw: 'Things fall apart; the center cannot hold...' None of us has the right to suppose it cannot happen here."<sup>37</sup> Even at remarks given at an Annual Meeting of the Chamber of Commerce, Nixon's theme was campus disturbances.<sup>38</sup> Perhaps his most prominent attack on campus disorders, however, was at the dedication of a library at General Beadle State College in South Dakota. Here he linked the issue of campus disorder with other ills affecting the country: "We live in a deeply troubled and profoundly unsettling time. Drugs and crime, campus revolt, racial discord, draft resistance – on every hand we find old standards violated, old values discarded, old precepts ignored... As a result of all this, our institutions in America today are undergoing what may be the severest challenge of our history. But the challenge I speak of today is deeper – the challenge to our values and to the moral base of authority that sustains those values."<sup>39</sup> The "New Mobe" – the Mobilization to End the War in Vietnam – threatened a massive march in Washington on November 15 1969. It would be made up largely of students around the country who would descend upon the city. Within the Haldeman and Ehrlichman White House records, many intelligence reports were filed, indicating that, despite Nixon's apparent disinterest (he let it be know that he would be watching a football game at the time was due to be held), the administration was actually deeply worried about the event.<sup>40</sup>

In a record of a meeting with the President in 1969 (the exact date is unclear but the document is contained in a file marked 1969), Ehrlichman noted the priorities of the administration as 1. Vietnam, 2. Inflation, 3. Youth disaffection, 4. Politics (which included a. Attack on military [including ABM fight] b. School issue, c. Other), indicating the importance the President put on “youth disaffection.”<sup>41</sup> Nixon also ordered investigations into whether student leaders were trained and financed by communists.<sup>42</sup>

Especially in the area of civil rights, the Nixon administration continued many of the policies begun under the Johnson administration, despite Nixon’s apparent promises to Southerners that school desegregation would be slowed. There is evidence in the files of a fair amount of confusion over civil rights strategies of the new administration. Panetta spelled out his objections: “The trouble was that no one really understood what Nixon had said or promised during the campaign, and his statements were shrouded in ambiguity and controversy.”<sup>43</sup> Upon taking office, Finch was left with some problems by his predecessor, Wilbur Cohen. Cohen had ruled that five school districts – two in Strom Thurmond’s South Carolina – had to lose federal school funds for failure to submit desegregation plans meeting HEW’s guidelines. On January 24 Finch told Under-Secretary (and liberal California Republican) John Veneman that he had “lost” on the fund-cutoff. Finch said that the President wanted the fund cutoff stayed for 60 days. The alternative plan was that the five districts would be cut off from their Federal funds effective January 29, but if they came up with acceptable plans within 60 days, they could recover all the funds (and two districts did so). Finch wrote to Chief Judge John R. Brown on August 19 asking for a stay until December 1. On October 29,

despite a contrary ruling by the circuit court, the Supreme Court decided that “the obligations of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.”<sup>44</sup> Nixon, however, distanced himself from the machinations between HEW and Justice. At a press conference on September 26, Nixon made his famous formulation that “there are those who want instant integration and those who want segregation forever. I believe that we need to have a middle course between those two extremes.”<sup>45</sup>

To liberals, Nixon appeared to be backing away from civil rights commitments of the previous administration. In April Nixon requested Congress to reduce the enforcement program for fair housing by \$4m. In June, the Justice Department came out against extending the Voting Rights Act of 1965, offering a substitute that would end the special sanctions against the South. However, the President stayed above the fray. At the ground level, HEW continued insisting that Southern schools desegregate. Many within the Nixon administration, at least at the lower levels, approved of more strident action by the agency to desegregate schools, buoyed in their opinions by court decisions like *Green v. County School Board of New Kent County*, which ruled that so-called freedom of choice plans, where schools simply opened their doors to children of any race, were not adequate if they did not result in integrated schools. The *Baltimore Sun*’s headline summed up the difficulties that ensued as Nixon’s balancing strategy and his attempt to find a non-existent middle ground on this issue lead to each side vying for the President’s favour with ever-increasing energy and desperation. On July 1 1969 the paper warned: “INTEGRATION WAR LOOMS INSIDE GOP.”<sup>46</sup> By this time, however, speechwriter William Safire records that Nixon thought he was “in mortal danger of

being perceived as a liberal. Worse, he felt this false perception could lead to a weakening of America's national will."<sup>47</sup> Nixon began to distance himself from the liberal camp. However, he still made no hard and fast decisions that might indicate the direction in which he felt his administration should proceed on civil rights. Panetta recorded the disputes that occurred. The extent of revolt in HEW was evident when 1800 employees signed a petition asking Finch to explain the Administration's civil rights policy. Panetta faced calls for his resignation from right-wingers in the Nixon team like Harry Dent (the former Strom Thurmond aide and self-proclaimed architect of the "southern strategy"), congressional liason Bryce Harlow and Patrick Buchanan and actually submitted his resignation in early October of that year. Panetta, who displayed a crusading and perhaps naïve belief in the rightness of immediate and comprehensive school desegregation efforts, did not have his resignation accepted until Feb 17, 1970 – a testament to the fact that the Nixon administration's position on school desegregation remained fluid in 1969.

Other key figures in the administration about the Nixon civil rights agenda in 1969 agreed that no new strategy was employed in 1969. Moynihan remarked that "The decision not to repudiate the social goals [of previous administrations] was signalled, but never quite articulated... Whatever the case, comparatively clear decisions were made. There was not to be a restoration. There *was* to be continuity."<sup>48</sup> Conservatives within the cabinet agreed. Harry Dent complained to Spiro Agnew that the "Southern Strategy" was not really being employed at ground level: "I don't need to tell you that I have been extremely concerned about the apparently schizophrenic posture of

this Administration, brought about mainly by the vacuous and ultra-liberal utterances from HEW.”<sup>49</sup>

A copy of a *Columbia* magazine editorial from August 11 1969 held in the Nixon files noted the careful attempt of the President to calm the waters on domestic issues: “Listening to President Nixon's “New Federalism” address on domestic matters, one marvelled at how carefully he steered between the extreme positions of liberalism and conservatism.”<sup>50</sup> Virtually the only guidance on policy issues by Nixon left things very vague. Nixon instructed his aides about domestic policy in a meeting in July that “just ‘cause it’s new doesn’t mean it’s right - but if it’s old, it’s wrong.” At another meeting Nixon “emphasized p.r. will be important - but don’t want to do anything we can’t deliver on – present case as exciting way as we can but first must be sure we can produce.”<sup>51</sup> Despite Nixon’s seeming sympathy towards the plight of the white South, there was little action in this direction. John Mitchell’s famous admonition to black leaders, “instead of listening to what we say... watch what we do,”<sup>52</sup> reflected a certain truth about the operations of the administration in 1969. And the record in terms of school desegregation indicates that this strategy bore at least some fruit. Nixon, mirroring his foreign policy strategy of playing opposing forces off against each other, leaving maximum room to manoeuvre, was clearly present here.

### Other aspects of the crisis

The crisis in 1969 was immediate and numerous experimental programs were tried in the hope that they might lessen the pressure of instability. In 1970 and



beyond, however, the deeper (though less immediate) nature of the crisis began to be apparent. After the riots and student unrest ended there was no return to the days of consensus. As Finch told the press in 1972 (in a passage underlined by Nixon), there existed at the time a “general syndrome of distrust about all our institutions -- the Church, corporate life, labor unions and higher education.”<sup>53</sup> Yet these were precisely the institutions celebrated by Gunnar Myrdal that had linked Americans with their government and within which they had realised a common purpose lay in tatters. Large sections of American society had become alienated from their government as the programs and policies appeared to fail. In a letter to the President, Moynihan indicated how he thought the rot had started. He informed Nixon that the “many businessmen” he had spoken to since leaving the administration all seem to hate the Administration.

I have been astonished -- that is the word -- at their hostility to the administration... As best I can tell, they mostly get this belief from their children who absorb it in the atmosphere of the elite universities. But they believe their children, and in consequence detest the administration. ...(Y)ou will recall I came down to Washington to work for you deeply concerned about the stability of the nation. I remain concerned. Vast changes have been made for the better. But in an odd way, appearances are worse.<sup>54</sup>

More disturbing, perhaps, was the fact that none of the programs or policies initiated by Nixon alleviated any of the ill feeling. Gary Wills emphasised the inexorable nature of the crisis: “What is hard, and essential, to convey is the *interaction* of resentments. The bitterness moved in crossing tides, an acid weave of right and left, old and young. Each shock deepened a fear, unsettled a hope.”<sup>55</sup> Lowi expressed the same problem in a different way: “It is as though each new program or program expansion were an admission of prior governmental inadequacy or failure without necessarily being a contribution to order and well-being.”<sup>56</sup>

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<sup>1</sup> Color blindness was one of the early casualties of the crisis in liberal values. In March of 1966, the Department of Labor reversed Truman's dictum that any indication of race must be left off employment forms. EEO-1 actually demanded to know of government contractors the race of their employees.

<sup>2</sup> transcripts of Panel No. 1-A, Jobs, November 17 1965, 64, Planning Session Papers, Reel 7, Records of the WHCCR.

<sup>3</sup> This idea received approval from high sources. The Republican National Committee considered the idea viable. One of the resolutions of the Temporary Resolutions Committee in their Report on the Task Force on Job Opportunities and Welfare, June 19, 1968 was to: "Help check the flow of people from the countryside to our great cities, where they often are unemployed and add to social unrest. This can be done by increasing job opportunities in our rural areas." (Folder labelled "Equal Opportunity," Box 60, RNC Records.) A telegram received by Edward Brooke in 1968 from the President of the NYC Labor Council of the AFL-CIO stated: "On March 7 we wrote to you concerning proposal dealing with root causes of racial disturbances in the cities. This proposal is to relieve unbearable conditions of agricultural workers who come to the cities as result of automation." (*Telegram from Harry Van Arsdale, Jr., President of the NYC Labor Council AFL-CIO*, April 15 1968, Edward W. Brooke: Correspondence: 1968 Civil Disorders Commission, Box 197, Papers of Edward W. Brooke, Library of Congress, Washington, DC).

<sup>4</sup> Alfred Blumrosen, *Black Employment and the Law* (New Brunswick, NJ: Rutgers University Press, 1971), 14.

<sup>5</sup> [Civil Rights] Background Material for *The Reluctant Guardians: A Survey of the Enforcement of Federal Civil Rights Laws* by Barney Sellers (note: it appears that this book was never published.) [CFOA 908], Box 61, WHSF: SMOF: Garment, NPMP, 1-68.

<sup>6</sup> Civil Rights Study Paper Draft, Housing, 1/5/71, Civil Rights - Garment-Nathan Study Committee [CFOA 908], Box 59, WHSF: SMOF: Garment, NPMP.

<sup>7</sup> Statement of William H. Brown III, Chairman, Equal Employment Opportunity Commission, to the House General Subcommittee on Labor, December 1 1969, EEOC 1969 [2 of 4][CFOA 7730], Box 84 WHCF: SMOF: Garment, NPMP.

<sup>8</sup> Background Material for *The Reluctant Guardians*, 1-28,29.

<sup>9</sup> Background Material for *The Reluctant Guardians* 1-53, 1-68, 2-8.

<sup>10</sup> Cited in Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960-1972* (Oxford University Press, 1990), 286.

<sup>11</sup> Godfrey Hodgson, *In Our Time: America from World War II to Nixon* (London: Macmillan, 1976), 275.

<sup>12</sup> cited in John Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (London: University of Chicago Press, 1996), 68.

<sup>13</sup> Editorial, *Ramparts*, Volume 4, No. 7, (November 1965), 3-4.

<sup>14</sup> cited in Byron E. Shafer, *Quiet Revolution: The Struggle for the Democratic Party and the Shaping of Post-Reform Politics* (New York: Russell Sage Foundation, 1983), 25.

<sup>15</sup> Statement by State Senator Jerris Leonard (Wisconsin) to the National, State, and Local Relations Subcommittee, National Republican Platform, July 31 1968, File marked "National, State, and Local Relations Subcommittee, National Republican Platform," Box 59, RNC Records.

<sup>16</sup> *Ibid.*

<sup>17</sup> "New Directions For Urban America," draft 3/19/68, Human Needs, Box 60 – 1968 Republican National Convention, RNC Records.

<sup>18</sup> Copy of article in *Washington Post*, March 3 1968 by Walter Lipman (title of article has been cut off the body) 'P&R Memo' House Republican Conference, Planning and Research Committee, Rep. Charles E. Goodell (NY), Chairman, file marked "Human Needs," 1968 Republican National Convention, Box 60, RNC Records.

<sup>19</sup> Cited in 'P&R Memo' House Republican Conference, Planning and Research Committee, Rep. Charles E. Goodell (NY), Chairman, file marked "Human Needs," 1968 Republican National Convention, Box 60, RNC Records.

<sup>20</sup> Theodore Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York: W.W. Norton & Company, Inc., 1969), 213.

<sup>21</sup> Norman Vieira, "Racial Imbalance, Black Separatism and Permissible Classification by Race," *Michigan Law Review*, Vol. 67 (June 1969), 1603-1618, 1611.

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- <sup>22</sup> Robert H. Finch, discussant, in Leon Friedman and William F. Levantrosser, eds., *Richard M. Nixon: Politician, President, Administrator* (Greenwood Press, New York, 1991), 173-175, 173.
- <sup>23</sup> See Mary Beth Norton et al, *A People and A Nation: A History of the United States: Volume II* (Boston, MA: Houghton Mifflin, 1994), 1006-1012.
- <sup>24</sup> Melvin Small, *The Presidency of Richard Nixon* (Lawrence, KA: Kansas University Press, 1999), 70, 157.
- <sup>25</sup> Irwin Miller, "Business has a war to win," *Harvard Business Review*, March/April 1969, 4-12 (continued on 164-68), 6-7.
- <sup>26</sup> Cited in *The Republican*, Vol. 3, No. 2 (February 10 1967), "The Republican," RNC Publications, Box 99, RNC Records.
- <sup>27</sup> A statement by Richard M. Nixon: NBC Radio Network, March 7 1968, 1968 Presidential Campaign: RNC news releases 8/23/68 - 9/25/68, Comment 8/26/68 - 11/4/68, Nixon speeches 10/67 - 9/25/68, 1968 Nixon Campaign: Press Releases and Nixon Speeches, Box 5, RNC Records.
- <sup>28</sup> An Address by Richard M. Nixon at the 72nd Congress of American Industry of the NAM Annual Dinner, Waldorf-Astoria, New York, December 8 1967, 1968 Presidential Campaign: RNC news releases 8/23/68 - 9/25/68, Comment 8/26/68 - 11/4/68, Nixon speeches 10/67 - 9/25/68, 1968 Nixon Campaign: Press Releases and Nixon Speeches, Box 5, RNC Records.
- <sup>29</sup> *Where the Votes Are*, prepared by the staff of the US Senate Republican Policy Committee, July 10 1966, RNC Publications, Box 99, RNC Records.
- <sup>30</sup> "Toward an expanded democracy," An address by Richard M. Nixon: CBS Radio Network, June 27 1968, 1968 Presidential Campaign: RNC news releases 8/23/68 - 9/25/68, Comment 8/26/68 - 11/4/68, Nixon speeches 10/67 - 9/25/68, 1968 Nixon Campaign: Press Releases and Nixon Speeches, Box 5, RNC Records.
- <sup>31</sup> Lowi, *The End of Liberalism*, xiii, 47-48.
- <sup>32</sup> Lowi, *The End of Liberalism*, xiii.
- <sup>33</sup> Ray Price, *With Nixon* (NY: The Viking Press, 1977), 47.
- <sup>34</sup> Richard M. Scammon and Ben J. Wattenberg, *The Real Majority* (New York: Coward, McCann & Geoghegan, Inc., 1970), 297.
- <sup>35</sup> "Nixon's Dream and Black Reality," Irving Howe in the National Black Economic Development Conference, 27, 28, 29 April [presumably a preconference position paper], [Minority Business] National Black Economic Development Conference [CFOA 7261], Box 125, WHCF: SMOF: Garment, NPMP.
- <sup>36</sup> Price, *With Nixon*, 49.
- <sup>37</sup> Statement on Campus Disorders, March 22 1969, *Public Papers of the Presidents of the United States: Richard Nixon, 1969* (United States Government Printing Office: 1970), 236.
- <sup>38</sup> Remarks at the Annual Meeting of the Chamber of Commerce of the United States. April 29, 1969 *Public Papers of the Presidents of the United States: Richard Nixon, 1969*, 334.
- <sup>39</sup> Address at the Dedication of the Karl E. Mundt Library at the General Beadle State College, Madison, South Dakota, June 3 1969. *Public Papers of the Presidents of the United States: Richard Nixon, 1969*, 236, 237.
- <sup>40</sup> An entire file in Ehrlichman's files was dedicated to the event. See Mobe, Box 20, WHSF: SMOF: John D. Ehrlichman, NPMP. See also Memoranda for the President's File (November 1969), Box 138, WHSF: SMOF: H. R. Haldeman: Haldeman Notes, NPMP.
- <sup>41</sup> Handwritten note on White House stationery, presumably by Ehrlichman, no date (found with other material from 1969), 105 Closed [desegregation][1 of 2], WHSF: SMOF: John D. Ehrlichman, NPMP.
- <sup>42</sup> Ehrlichman remembered: "During that first year, the President was continually calling for intelligence about domestic violence and bombings" (John Ehrlichman, *Witness to Power: The Nixon Years* [New York: Simon and Schuster, 1982], 159). On a tape, Nixon ordered early in 1970: "I want a follow up on the Reagan report at the Governor's Conference and then to the extent that facts will back it up I want something prepared, Buchanan or in this case maybe even Huston, can "write the column" on the violent student leaders. The fact that some of them are trained in Cuba and the fact that they do resort to violence." RN Tape 5/13/70, Memos - May 1970, Box 2 Folder 1 of 6 [Documents from Boxes 1-9] WHSF: SMOF: President's Personal Files; Contested Files. Nixon also had ordered a very willing J. Edgar Hoover to conduct investigations. Hoover sent agents to investigate various groups at the SDS National Convention.

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They reported that “members of the WSA [Worker Student Alliance, a split-off from the SDS] were, comparatively speaking, well groomed. However, most of the individuals at this meeting were very dirty, and the stench from body odor was particularly oppressive in the smaller rooms.” Little else was included in the report. FBI Current Intelligence Analysis, no date; [Unnamed File - J. Edgar Hoover], Box 18. WHSF: SMOF: Ehrlichman.

<sup>43</sup> Cited in Roland Evans, Jr. and Robert D. Novak, *Nixon in the White House: The Frustration of Power* (New York: Random House, 1971), 155.

<sup>44</sup> See Evans and Novak, *Nixon in the White House*, 142-159.

<sup>45</sup> The President’s News Conference of September 26, 1969, *Public Papers of the Presidents of the United States: Richard Nixon, 1969* (United States Government Printing Office: 1970), 755. See also Evans and Novak, *Nixon in the White House*, 156. The scheme of passing the issue into the courts was approved by even the most recalcitrant right-wingers in the administration at the time. Patrick Buchanan observed in 1970: “Politically, it would be probably be better for RN if the Supreme Court moved to press integration -- which would then set up a confrontation between the President and the court -- putting the President on the safe side of the issue.” (Memorandum for the President from from Buchanan, December 8 1970, Haldeman: Memos To the President 1970, Box 138; WHSF: SMOF: Haldeman, NPMP).

<sup>46</sup> Leon E. Panetta and Peter Gall, *Bring Us Together: The Nixon Team and Civil Rights* (New York: J. B. Lippincott Company, 1971), 213.

<sup>47</sup> William Safire, *Before the Fall: An Inside View of the Pre-Watergate White House* (New York: Doubleday and Co., 1975), 135.

<sup>48</sup> Daniel P. Moynihan, *The Politics of a Guaranteed Income: The Nixon Administration and the Family Assistance Plan* (Random House: New York, 1973) 69. Moynihan’s writing, it should be noted, often imputed his own perceptions into the mind of Nixon with the aim of convincing the President that they were his own thoughts. This book, written at a time when it seemed that the Family Assistance Plan might still be implemented, is certainly no exception.

<sup>49</sup> Memo for Harry Dent from the Vice President, May 29 1969, 105 Closed [desegregation][1 of 2] Box 30, WHSF: SMOF: Ehrlichman, NPMP.

<sup>50</sup> Copy of editorial of *Columbia Magazine*, (August 11 1969), Ehrlichman Memos 1969-70, Box 1, WHSF: SMOF: Harry S. Dent.

<sup>51</sup> Handwritten Notes by Haldeman of a Cabinet Meeting held Jan 22; HRH Cabinet Notes Jan 69, HRH Cabinet Notes Jan 69 -- Memos/ Ron Ziegler (Mar. ‘69), Box 49, WHSF: SMOF: Haldeman: Alpha Subject Files, NPMP.

<sup>52</sup> Cited in Safire, *Before the Fall*, 265.

<sup>53</sup> March 27-31 1972, Box 40, President’s Office Files (POF): Annotated News Summaries, NPMP.

<sup>54</sup> Moynihan letter to the President, March 8 1971, Moynihan Letter Flap, Box 86, WHSF: SMOF: Charles M. Colson, NPMP.

<sup>55</sup> Garry Wills, *Nixon Agonistes: The Crisis of the Self Made Man* (Boston, MA: Houghton Mifflin Company, 1970), 38.

<sup>56</sup> Lowi, *The End of Liberalism*, 69.

## Chapter 5

### AFFIRMATIVE ACTION AS LEGITIMATION CRISIS

The political nature of the crisis pushed the Johnson administration and, later, Nixon towards instituting affirmative action programs. These objective conditions form at least part of the reason why affirmative action was finally implemented in the form of the Philadelphia Plan. Whoever was elected in 1968 (discounting the extremely remote chance that it was George Wallace), very good reasons for moving in this direction existed already. The immediate task for the newly elected administration faced – besides calming the storm of protest – was to put into place mechanisms designed to restore the authority of government and the status quo. In other words, the incoming administration had to restore government's ability to govern. Bureaucracy, as discussed above, had no particular direction after the discrediting of many of the Great Society programs. As Nathan noted, discussions of “delivery problems” and “performance gaps” were in vogue in the late 1960s.<sup>1</sup> It became obvious to all in the run-up to the 1968 election that some sort of restructuring and decentralization of Federal programs would have to be instituted. Robert Kennedy, for instance, told a college audience in Utah during the race for the 1968 Democratic nomination that “We must return control to the people themselves.”<sup>2</sup>

Most of the political mechanisms in place since the New Deal to integrate various different groups within American society were failing to do so, in the eyes of the political and economic elite, by the late 1960s. At the preliminary meeting of the 1966 White House Conference on Civil Rights, delegates called for a discussion on the

“psychological dimensions of citizenship” and complained that “the old basis for such (political) organisations – the ward clubhouse and the organisation of job-holders – is decaying or eliminated.”<sup>3</sup> Another preliminary report at that conference warned that “the concentration of Negroes in overcrowded areas decreases their political representation in city councils. This, in turn, reduces patronage posts and the exclusion from a fair share of the ‘spoils system’ discourages participation in ward organisation.” The same report went on to suggest that besides the danger of riot is the danger that non-participation of blacks in the electoral process will “deal a serious blow to effective government in the urban North.”<sup>4</sup>

Jerris Leonard produced a thoughtful piece on federalism and revenue sharing, later to be a key program within the Nixon domestic agenda. While federalism had long been a programmatic unifier within the Republican Party (opposing the centralism of the New Deal), Leonard related it to the problem of alienation and the relationship between the citizen and government in the United States. Federalism thus became more than simply a political glue for the Republicans – it emerged as a possible solution to the “depression of the national spirit.”<sup>5</sup>

I realize that the great expansion of federal power began long before I became a legislator. But I submit to you that it is really only been in the last dozen or twenty years that the individual citizen has become despondent over his inability to get a handhold on his government. ...While paying lip service to federalism and local government, we have established a monolithic centralism before which the individual feels powerless. His alternatives are membership in mass protest groups, or introverted withdrawal -- neither of which serve well the cause of democracy.<sup>6</sup>

The most dramatic effect of this problem could be seen in the consecutive summers of rioting. The task of extending links into the black community thus became paramount. At a series of meetings in Boston occurring in July 1967 after disturbances in

the area, the lack of any sort of organisation within which black demands might be channelled was repeated: “A recurring theme during the four days of meetings was the powerlessness of the Negro community.”<sup>7</sup> An analysis of disturbances in Plainfield, New Jersey also noted that “lack of coherent political organization” played a key role in the riot.<sup>8</sup> However, as the planning meeting of the White House Conference on Civil Rights (as well as the 1965 Voting Rights Act) indicated, efforts at creating participation within the black community existed before the most serious rioting. A report to the National Governors Conference dated May 10 1967 (and thus predating much of the rioting that year) by the “Advisory Committee on Federal-State-Local Relations” was entitled “Full Participation by All People in the Process of Government.” In its second section were the steps for creating participation:

Provide for participation by all citizens in the election process...

Foster dialogue between citizens and government: create and support human relations agencies or commissions at local and state levels; encourage dialogue between majority and minority groups...

Encourage community improvement groups...

Assure representation of all citizens...<sup>9</sup>

The Kerner Commission Report focussed much of its attention on this problem once the initial fear that the riots had somehow been orchestrated by Moscow no longer looked feasible. A letter from David Ginsburg, the Executive Director of the commission, stated at the outset that: “The basic theme of our work is that we must recognize and deal with the fact of deep political alienation in the ghetto.”<sup>10</sup> The concern was that none of the institutions through which most Americans related to their government appeared to work – or even to exist – for black Americans. The authority of the police in ghetto areas hardly existed. Ginsburg continued: “What kinds of instruments (other than the police) are available for easing community tensions? For example, we are

looking preliminarily at the role of Human Relations Commissions, the possibility of establishing new grievance machinery (perhaps modelled after labor mediation services); and the ombudsman idea.”<sup>11</sup> In order to maintain some sort of control over ghetto areas, the Commission toyed with the fairly ludicrous idea of community policing roles for street gangs such as the “White Hats” in Tampa, FL, the “Rebels with a Cause” in Washington, DC, and the “Blackstone Rangers” in Chicago!<sup>12</sup>

Not surprisingly, many of the solutions to these problems dealt with the lack of jobs within the ghettos. Some of the recommendations discussed by the Kerner Commission included in a section entitled “To expand and Improve Employment Opportunities”:

Increase job opportunities: recruit, train and hire slum area residents for public employment; provide tax incentives for industry and business to locate in blighted areas, provide neighborhood counselling to small business in urban areas; encourage industry and labor to expand job opportunities through across-the-board hiring of disadvantaged persons; promote and enforce equal employment practices in both public and private employment; use career fairs to publicize availability of jobs; utilize mobile employment units to bring employment information to the unemployed.<sup>13</sup>

Though these suggestions fall short of the kind of affirmative action contained in the Philadelphia Plan or in “set-asides” as per Section 8(a) of the Small Business Act (see Appendix III), they at least point the government in the direction of new policies aimed at increasing employment in the ghettos, the riots themselves having demonstrated graphically the inadequacy of existing policies. Clearly, new policies too radical to be considered in previous years would have to be examined in the light of seemingly continuous rioting.

Just as serious was the destruction of ideals that had given the vast bureaucratic structures of US society some ethical and moral coherence mentioned



earlier. An entire generation of young men and women joined the government at various levels inspired, perhaps, by Kennedy's public-service ethos. Committed to the cause of civil rights, this group was hostile to perceived attempts by the Nixon administration to slow down civil rights progress. Representation of Republicans at the senior career level of the bureaucracy, Bert Rockman and Joel Aberbach show, was quite low. Nearly twice as many senior bureaucrats in the social services agencies (for example, Health, Education and Welfare [HEW] and Housing and Urban Development[HUD]) were affiliated with the Democrats than with the Republicans – 24 percent were Republican, 30 percent independent, 46 percent were Democrats.<sup>14</sup> However, had Hubert Humphrey won the election on his centrist, union-based plurality, rifts between these “old-style” Democrats and younger, more civil rights-oriented activists might have caused similar problems. Certainly, these rifts were apparent during the 1968 and 1972 Democratic National Conventions.<sup>15</sup> The administration that took power in 1969 would have to reach out not only to the black community but also to this large and powerful section of the bureaucracy.

Nixon used affirmative action clauses to provide some sort of coherence and continuity between past programs and new initiatives. Specifically, they ensured that the reforms initiated by Nixon under the rubric of “New Federalism,” designed to decentralise government and redistribute power in favour of local and state governments, would be justified in the eyes of liberals. Affirmative action served to allay fears barely dissipated since the height of the civil rights struggle that local and state governments might not be as progressive as liberals might wish. Additionally, affirmative action ensured that central government actually extended – rather than diffused – its power

while localising the controversy that civil rights measures often attracted. Under New Federalism projects earmarked for decentralisation included primarily services provided in the community – education, social services for the poor, manpower training, hospitals, urban and rural community development, and law enforcement. Instead, these programs were to be administered by state and local governments. However, indicative of the dual nature of Nixon's decentralisation programs, Nixon made affirmative action clauses a contingency for continued funding, indirectly controlling many of the departments with which he struggled. In the civil service, affirmative action measures initiated with EO 11478 were specifically used to provide some sort of mechanism to indicate the performance of one agency or another. As a Civil Service Commission report sternly noted, "Agencies have submitted EEO plans; we have reviewed them; and these plans are now being used to measure agency performance."<sup>16</sup> Thus, the initiation of affirmative action policies had as at least part of their purpose creating an ethical framework against which the performance of government agencies might be judged.

In fact, New Federalism, rather than destroying the Great Society programs of direct aid to the poor and minorities, might be viewed as formalising their structures, of incorporating them into the permanent structure of government. Certainly, this was Nathan's opinion. He noted that:

The New Federalism also opposed reliance on the kinds of quasi-governmental antipoverty agencies that had been established in the Great Society period under the Johnson Administration. Nixon spokesmen often took a hard line on this issue. However, a more positive way of looking at this subject is to acknowledge that these community-action and model cities agencies, in fact, have had an important positive impact as a catalyst and a political training ground for minority groups and the poor, but that they do not represent appropriate long-term governmental arrangements. Rather than sponsoring these 'side games' for the poor and the minorities, the New Federalism can be portrayed as seeking to draw all citizens into the main arena of local politics, which increasingly is a fertile area for

minorities as their relative numbers in the central cities increase.<sup>17</sup>

The same might be said of affirmative action programs. In many ways they formalised the informal structures developed by the Johnson administration aimed at giving African-Americans and other minorities more employment opportunities within the American economy.

### The factor of recession

The economic conditions for affirmative action were better in the late 1960s than at any time since World War II. In the first place, affirmative action policies became more viable as contractors became more plentiful and contracts more scarce. As such, they were far better suited for conditions of recession than other civil rights policies. Paul Moreno suggests that contractors, who had disadvantages in government dealings during the thirties, held the upper hand with massive defence spending in the late 1940s and 1950s.<sup>18</sup> But at the end of the 1960s contractors faced a bear market. The economy went into recession in late 1969. Thus, the construction and many other blue-collar industries floundered at the time and many of the military and space program contracts dried up in the early 1970s as the Vietnam war effort and the space programs were cut back. A viable affirmative action plan became an asset in the battle to secure a valuable contract. In a memo to the President from Secretary of Labor George P. Shultz, he reminded his boss that “actions deemed desirable by the Blacks leave many whites unhappy, and vice versa. The giving of economic help to the Blacks does not carry the same disadvantage.” Shultz pointed out that a “program like minority enterprise, with a

relatively small amount of money compared to those for jobs, health or education, can have greater visibility and impact, as new stores, shops and plants benefit from it and provide minority employment.”<sup>19</sup>

Because more US workers in the 1970s than at any other time in history depended, directly or indirectly, upon the Federal government for their wages, “rulemaking to bind recipients to federal dollars,” in Graham’s words, became an option.<sup>20</sup> Affirmative action in its new guise would now be brought to bear on a large percentage of the US workforce. As well as an estimated one-third of the US workforce working for government contractors, 15.2 percent of the civilian labor force worked for the government at either the federal, the state or the local levels.<sup>21</sup> The changing economic structure was tilting towards more government control (rather than less, even during the reigns of Republican presidents who wished to roll back government). The post-war period saw large growth in government purchases of goods and services, averaging 4.24 percent per year between 1948 and 1973. Government purchases made up 21.5 percent of the Gross National Product in 1970. This figure was close to 40 percent higher than the total gross private domestic investment. All government payroll increased by an average annual rate of 3.62 percent per year in the same period. Wages and salaries make up, on average, 75 percent of the US GNP but government wages and salaries are one-fifth of this total. Economists John F. Walker and Harold G. Vatter note: “Labor income is thus directly controlled by the government to an extraordinary extent.”<sup>22</sup> When direct control is added to indirect control exercised through contracts, it is hardly surprising that economists at the White House held out great hope for at least the possibility of effective enforcement of affirmative action.

Second, there was also a merging of the public and private spheres occurring in economic terms, as private industry began to rely more heavily on government patronage, having the effect of breaking down barriers to government interference long held within private industry. Walker and Vatter also note that the extent of government involvement in the economy went further than the statistical evidence might have suggested: "...we can add to the government's spending growth the element of *pervasive public involvement* in much, if not most, of the economy's activities" [emphasis in original]. They argue that the public/private distinction within the economy has become increasingly meaningless with a "contemporary fusion of the public with the private" spheres extending beyond strictly economic terms "by virtue of the vast extension of government's nonpecuniary interventions in economic affairs."<sup>23</sup>

Shared fears over the dislocation and chaos that appeared to grip the nation at the turn of the decade contributed to the new cooperative nature of government and private industry. Business had abandoned its antipathy to government interference in hiring and promotion decisions. The aforementioned Irwin Miller argued that business had to let down its guard against government interference in this time of crisis. He called for what he termed "a war effort." Miller summoned his business colleagues to think and act anew and to consider affirmative action policies: "Up to now business has reacted to the impact of race on the communities in which it is located. We know now in business how important it is to act rather than react. Is it unthinkable that we should *plan* the total racial integration of each of our businesses, even to the point of importing members of minority groups...?" A survey of executives of the *Fortune's* 750 largest companies revealed that 78 percent of fourth and fifth level executives agreed with "lowering the

company's employment qualifications to hire more from disadvantaged groups," though their lower level colleagues disagreed.<sup>24</sup> The elite shared a common interest in keeping society together. The crises that existed at the time gave them a common purpose that allowed them, despite their commitment to democracy, to consider policies that most Americans opposed in an effort to keep the peace.

Considerable resources came from company coffers for research on minority problems. General Electric (GE) published a report entitled "Our future business environment" in 1968.<sup>25</sup> It claimed that the urban minority problem was "the dominant one of the domestic social, political, and economic scene for the next ten years." In January 1970 GE published another report called "A Decade of Tensions and Decisions: The Minority Environment in the Seventies." In the survey of opinions it used, it found that, though large-scale rioting would probably not occur again, "more calculated and selective attacks" might target, amongst other things, "businesses... that discriminate against minorities." "The likelihood of such attacks is seen to be in direct proportion to the lack of minority progress and the strength of white 'backlash.'" The report went on to urge preferential treatment.<sup>26</sup> The recession, therefore, both made affirmative action a cheap and eminently possible option at the same time as heightening the general feeling of crisis that united the elite around previously unthinkable solutions.

Even if large government contractors had not wished the government to take some measures to ensure stability, they might not have had the power to resist a determined administration. By the time Nixon took office, the time when government contractors had dictated the terms was over. Comparing the period 1961-68 with that of 1969-83, the annual compound rate of growth of all government purchases of goods and

services slowed from an average of five percent to 0.6 percent.<sup>27</sup> With the winding down of the Vietnam War and the attempts by the Nixon administration to cut the federal deficit, contractors were left in a weaker position. Competition became fiercer, leaving the government in a far stronger bargaining position. The unions, also, were forced on the defensive by the slowdown.

### Affirmative action and legitimation crisis

At another level, the United States government was pushed in the direction of more intervention into civil rights in areas that had formerly been private matters, despite the intentions of the Nixon administration. The most compelling system-wide reasons for the proliferation of affirmative action policies under the ostensibly conservative Nixon administration have been suggested by the German social theorist Jürgen Habermas in *Legitimation Crisis*. Habermas described a process whereby the State extends its activities into realms previously organised spontaneously and on a local, informal, and private basis. The process is triggered by fears within the establishment that the legitimising political system does not succeed in maintaining the requisite level of mass loyalty (and thus its own authority). This threatens the informal arrangement within advanced capitalist democracies whereby, as Gabriel A. Almond and Sydney Verba put it, the democratic citizen is “active, yet passive; involved, yet not too involved, influential, yet deferential.”<sup>28</sup> A legitimacy deficit, Habermas explained, “must be based on a motivation crisis – that is, a discrepancy between the need for motives declared by the State, the educational system on the one hand, and the motivation supplied by the

socio-cultural system on the other.”<sup>29</sup> In other words, a philosophical confusion about the motivations and meanings of society emerges concomitantly with a legitimation crisis.

This sort of a crisis, Habermas insisted, was not a constant phenomenon within advanced capitalist societies where a legitimation *deficit* might occur as the State assumed aspects that had formerly been dealt with by the market. Instead:

...only when members of a society experience structural alterations as critical for continued existence and feel their social identity threatened can we speak of crises. Disturbances of system integration endanger continued existence only to the extent that *social integration* is at stake, that is, when the consensual foundations of normative structures are so much impaired that the society becomes anomic. Crisis states assume the form of a disintegration of social institutions.<sup>30</sup>

The crisis that Nixon faced in the aftermath of the turmoil of the 1960s might fairly be represented as a legitimation crisis. The consensus that had broadly characterised post-war American society no longer existed. Existing sources of authority – the institutions celebrated by Myrdal – disintegrated. A rejection – especially by young Americans – of existing modes of authorities took place not only within “hippie” communities but also within those Americans who supported Wallace. This latter group rejected the traditional political system like many who espoused a left-wing critique of American politics. It was commonly observed at the time that America was disintegrating into differentiated groups and factions. Nixon had taken power simply by personifying a negative assessment of the situation in the late 1960s, by *avoiding* extremes but without any coherent program. There existed a crisis far more generalised and less tangible than the direct threat to authority demonstrated in the rioting in the ghettos.

If we view the issue of civil rights within the context of a legitimation crisis, Nixon’s actions become easier to understand. Before the late 1950s and 1960s, the



Federal Government studiously avoided becoming involved in local race relations issues. as we have seen in Chapter 1. State and local government had adapted to local cultural patterns. There was little attempt – despite the rhetoric – by government at any level to reform racial attitudes. As much of the material in the first chapter indicates, though the new international role of the United States put pressure on it to reform racial practices and attitudes, it hoped to do so by example. Direct involvement in civil rights issues was avoided as much as possible. The civil rights movement, though, was able to pressure the Federal Government into involving itself first with education issues and later with more comprehensive interventions into matters that had in the past been considered local matter of customs. This intervention created the need for further intervention when focus shifted to Northern attitudes and patterns. Nixon, despite his conservative instincts on the subject, was forced to implement a further round of intervention.

As Habermas argued, however, the intervention into previously private spheres has the unfortunate effect of undermining the institutions that had reified society. Advanced capitalist societies necessarily encroach upon previously privatised economic spheres and socio-political spheres in order to shore up weaknesses created by destructive tendencies inherent within capitalism. For example, the State may have to take over unprofitable industries (like railways) that are essential to capitalism as a whole and, historically, has had to pass laws preventing children from dangerous or debilitating work to counter the destructive effect of factory work on families. As Habermas notes, however, the effect of government involvement in a sphere that was previously governed by informal local traditions has the effect of undermining those traditions: “It ...results from the fact that the fulfilment of governmental planning tasks places in question the

structure of the depoliticized public realm and, thereby, the formally democratic securing of private autonomous disposition of the means of production.”<sup>31</sup> Legislating to protect children, for example, has the effect of undermining the institution that had traditionally assumed that role – the family.<sup>32</sup>

Habermas’s theory – if we understand it to be an analysis of a specific historical set of circumstances occurring from the late 1960s – provides the most convincing reason for Nixon’s rhetorical opposition to the expansion of government while he oversaw a massive encroachment of the State into the lives of Americans. He was forced into actions he does not wish to take, actions that in many ways ran counter to his political and gut instincts. He had to expand programs he did not particularly believe in that threatened his political constituency. Though Graham is right to point to the role of “aggressive men” pursuing their own agendas as a force behind affirmative action,<sup>33</sup> it must be located within this process of the inexorable expansion of State apparatus pointed out by Habermas.

The legitimation crisis comes as the expansion of State activity creates a *disproportionate* need for legitimation, both because of the need to justify additional spheres of State activity and because the boundaries between the cultural system and the political system shift in favour of the latter. Cultural affairs that were formerly taken for granted must now fall into the administrative planning area. Areas of human activity that were once regulated and legitimated informally and locally are now subject to State regulation. But State action replacing this informal regulation cannot be solely mechanistic – the purposes for acquiring these new realms must be justified. Why should the State be active here, to what end, and by what guiding philosophies?<sup>34</sup> Thus, Nixon

and his administration struggled to justify ideologically the actions taken and often did not succeed.

Unfortunately for the administration, the process is unrelenting as the problems thrown up are insoluble. As the validity of past norms, traditions and institutions is undermined, so government must step in to try to replace those functions that were formerly processed informally within the cultural sphere.<sup>35</sup> Once the unquestionable character of traditions is destroyed, more areas within the private sphere come under scrutiny. The destruction of the traditions and informal regulations sets off a panicked reaction by the authorities as there appears to be a lack of controls and rules governing the whole sphere. Habermas warned that the entire private sphere was in danger of being destroyed through this process.<sup>36</sup> Alan Wolfe expressed the problem in a slightly different fashion, showing that options close with the enactment of the whole process:

The activity of the state has increased to the point where it has become a major producer and certainly the major consumer, but often forgotten is that the growth in potential power of the state is matched by a decline in the options that the state has at its command. For this reason, the increased activity of the state reflects, not an expansion of alternatives, but an exhaustion of them.<sup>37</sup>

Johnson's civil rights actions aimed to, as Habermas put it, "ward off system crisis" by focusing "all forces of social integration at the point of the structurally most probable conflict [civil rights] – in order all the more effectively to keep it latent."<sup>38</sup> Affirmative action measures differed, however, from previous civil rights initiatives in that they no longer simply exhorted American citizens at all levels to adjust their behaviour in order to include African-Americans within the economic and social life of the country. The crisis that created the need for affirmative action sprang from the

examination in light of the racial crisis of the 1960s of the (generally private) institutions that ostensibly created the basis of equal opportunity. They were found wanting. Existing mechanisms that should have created the basis of equal opportunity in both public and private employment, higher education and traditional contracting arrangements simply did not work for blacks. Affirmative action broke new ground in that it attempted to replace these traditional structures that had proved inadequate to the inclusion of black Americans within American life with a specific regulatory structure. It responded to a legitimization crisis initially within the African-American community that, by the time Nixon took power, extended way beyond.

However, the incursion of the State into this sphere of formerly quasi-privatised labor relations,<sup>39</sup> the civil service, contract arrangements (whereby the lowest bidder is awarded the contract), school and higher education allocations, and local and state government systems undermined many of the traditional motivations underlying these systems. As Habermas might have put it, there existed a discrepancy between the need for (racially liberal) imperatives declared by the State, the educational system and the occupational system on the one hand and the motivations supplied by the socio-cultural system, such as individualism, the tradition of merit in both employment and higher education places, traditional managerial prerogative to hire and fire as managers saw fit, and even the law, which specifically forbade quota-based systems. In many ways, the motivations behind affirmative action had to *replace* the assumption behind traditional socio-cultural structures, changing themselves in the process.

Also interesting in light of Habermas's theory is the way that affirmative action programs, once initiated, multiplied and extended into more and more spheres as

the aforementioned traditional systems eroded. The inexorable nature of the growth of affirmative action structures mirrors, as we have seen, the description that Habermas used to illustrate the fact that legitimacy crises cannot be solved. The extension of affirmative action into some spheres undermined traditional modes of hiring and accepting students in others, resulting in the adoption of affirmative action criteria within these new spheres.

Yet one other aspect related to Habermas's model stands out. A lack of philosophical justification or coherence to early affirmative action measures reflected a general turmoil about the legitimacy of socio-cultural traditions and the legitimacy of the motivations behind new administrative procedures. Early affirmative action measures were not (and could not be) defended confidently, especially after the initial justifications – the need to extend civil rights and the threat of rioting – lost resonance, despite the destruction of socio-cultural traditions that stood in the way of affirmative action measures. Instead some new basis of authority had to be created that would provide the basis for the widespread adoption of these measures. Here was a motivation crisis, created by the need for motivation by the State and the educational system, and the motivation behind the existing socio-political system.

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<sup>1</sup> Richard P. Nathan, *The Plot That Failed: Nixon and the Administrative Presidency* (London: John Wiley and Sons, Inc., 1975), 15.

<sup>2</sup> *Ibid.*

<sup>3</sup> Memorandum from J.Q. Wilson and H.D. Price to the WHCCR, November 3 1965, Sylvester Papers, Reel 5, Records of the WHCCR.

<sup>4</sup> Memorandum from Sterling Tucker to Berl Bernhard, Harold Fleming, Carl Holman, and Liz Drew to the WHCCR, November 5 1965, Reel 5, Sylvester Papers, Records of the WHCCR.

<sup>5</sup> In a widely quoted report, the National Committee for an Effective Congress observed in 1967 that: "America has experienced two internal crises in her history: the Civil War and the economic depression of the 1930's. The country may now be on the brink of a third trauma, a depression in the national spirit." (cited in copy of *NYT*, December 26 1967, contained in file marked "Human Needs," 1968 Republican National Convention – Box 60, RNC Records).

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- <sup>6</sup> Statement by State Senator Jerris Leonard (Wisconsin) to the convention, National, State, and Local Relations Subcommittee, National Republican Platform, July 31 1968, 1968 Republican National Convention – Box 59, RNC Records.
- <sup>7</sup> “Voice of the Ghetto: Report on two Boston Neighborhood Meetings,” by the Massachusetts State Advisory Commission to the United States Commission on Civil Rights July 1967, Civil Rights: Massachusetts State Advisory Committee to the US Commission on Civil Rights, Box 422, Papers of Edward W. Brooke, Library of Congress.
- <sup>8</sup> Analysis of Plainfield, NJ Disturbance, Office of the Assistant Deputy Director for Research, Staff Paper No. 3 draft, October 29 1967, Box 464, Papers of Edward W. Brooke, Library of Congress.
- <sup>9</sup> Memo to Honorable Otto Kerner, Chairman, National Advisory Commission on Civil Disorders with attached “Call and Commitment: Action to Alleviate Civil Disorder and Eliminate Social and Economic Injustice,” National Governor’s Conference, Advisory Committee on Federal-State-Local Relations (Draft) 10/5/67, Box 465, Papers of Edward W. Brooke, Library of Congress.
- <sup>10</sup> Memo to the Commission from David Ginsburg, Executive Director, The National Advisory Commission on Civil Disorders, Nov 7 1967 plus attached “Survey Paper on Short-Term Domestic Program Options,” no date, National Advisory Commission on Civil Disorders - Records, Nov. 1967, Box 465, Papers of Edward W. Brooke, Library of Congress.
- <sup>11</sup> *Ibid.*
- <sup>12</sup> *Ibid.*
- <sup>13</sup> “Call and Commitment: Action to Alleviate Civil Disorder and Eliminate Social and Economic Injustice,” National Governor’s Conference, Advisory Committee on Federal-State-Local Relations (Draft) 10/5/67, Box 465, Papers of Edward W. Brooke, Library of Congress.
- <sup>14</sup> Joel D. Aberbach, Bert A. Rockman, “Clashing Beliefs Within the Executive Branch: The Nixon Administration Bureaucracy,” *The American Political Science Review*, Vol. 70, No. 2. (June 1976), 456-468, 458.
- <sup>15</sup> Byron Shafer describes in detail the adoption of a system of proportional representation by the Democratic Party after the disastrous 1968 convention. A commission headed by Senator George McGovern suggested a higher intake of blacks, women and youth as representatives. See Byron E. Shafer, *Quiet Revolution: The Struggle for the Democratic Party and the Shaping of Post-Reform Politics* (New York: Russell Sage Foundation, 1983).
- <sup>16</sup> United States Civil Service Commission *Preliminary Report of Minority Group Employment in the Federal Government*, 1969, (Washington DC: US GPO, 1969) SM-70-69A, 8.
- <sup>17</sup> Nathan, *The Plot that Failed*, 24-25.
- <sup>18</sup> Paul E. Moreno, *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America 1933-1972* (London: Louisiana State University Press, 1997), 70.
- <sup>19</sup> Attachment to Memorandum to the President from Shultz, September 17 1971. [President’s handwriting, September 16 thru 30, 1971] Box 7, WHSF: POF: President’s Handwriting, NPMP.
- <sup>20</sup> Hugh Davis Graham, “Legacies of the 1960s: The American ‘Rights Revolution’ in an era of divided governance,” *Journal of Policy History*, Vol. 10, No. 3, (1998), 159-172, 164.
- <sup>21</sup> Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960-1972* (Oxford University Press, 1990), 341.
- <sup>22</sup> John F. Walker and Harold G. Vatter, *The Rise of Big Government in the United States* (London: ME Sharpe, 1997), 80. Vatter and Walker, *The Inevitability of Government Growth* (New York: Columbia University Press, 1990), 203, 218.
- <sup>23</sup> Vatter and Walker, *The Inevitability of Government Growth*, 212, 213. See generally their section on the changes in distribution heralded by government intervention, 212-223.
- <sup>24</sup> Irwin Miller, “Business has a war to win,” *Harvard Business Review* (March/April 1969), 4-12, (continued 164-168, 194-195), 194.
- <sup>25</sup> This, however, was hardly new. The Ford foundation had been funding studies on minorities since the 1930s and the Carnegie Corporation had, of course, enlisted Gunnar Myrdal to carry out research later published as *An American Dilemma* just as they cut short programs they had funded investigating eugenics.
- <sup>26</sup> “A Decade of Tensions and Decisions: The Minority Environment in the Seventies (For Circulation Among General Electric Management),” January 1970, produced by General Electric, annotated copy

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contained in [Ex] HU 2 1972 Onwards, Box 4, Subject Files: HU (Human Rights); WHCF (hereafter WHCF), NPMP.

<sup>27</sup> figures from Vatter and Walker, *Inevitability of Government Growth*, 209.

<sup>28</sup> cited in Jürgen Habermas, *Legitimation Crisis*, translated by Thomas McCarthy (London: Heineman, 1976), 77.

<sup>29</sup> Habermas, *Legitimation Crisis*, 75. Of course, the outline sketched here is necessarily an abbreviated version that misses out many of the nuances and details of Habermas's complex theory. It should also be noted that Habermas later rejected his theory in its details, but retained his central point in his more recently published book, *Between Facts and Norms*: "the independent establishment of illegitimate power and the weakness of civil society and the political public sphere can come to a head in a 'legitimatory dilemma' ... Then the political system is sucked into mutually reinforcing legitimacy and steering deficits." (cited in William Outhwaite, ed., *The Habermas Reader* [Cambridge, Polity Press, 1996], 17). A useful introduction to Habermas's often complex theories is Robert C. Holub, *Jürgen Habermas: Critic in the Public Sphere*, (London: Routledge, 1991). See also William Outhwaite, *Habermas: A Critical Introduction* (1994 Oxford: Polity, 1994) and *The Habermas Reader* (Cambridge: Polity Press, 1996). Of invaluable insight into the ways that the problems outlined by Habermas have developed today is James L. Nolan, Jr., *The Therapeutic State: Justifying Government at Century's End* (New York, NY: New York University, 1998).

<sup>30</sup> Habermas, *Legitimation Crisis*, 4.

<sup>31</sup> Habermas, *Legitimation Crisis*, 46.

<sup>32</sup> Habermas was careful to delineate between a *rationality crisis*, in which the administrative system does not succeed in reconciling and fulfilling the imperatives received from the economic system, and a *legitimation crisis*, whereby the legitimizing system does not succeed in maintaining the requisite level of mass loyalty while the steering imperatives taken over from the economic system are carried through. See *Legitimation Crisis*, 46.

<sup>33</sup> Hugh Davis Graham, "Richard Nixon and Civil Rights: Explaining and Enigma," *Presidential Studies Quarterly*, Vol. XXVI, No. 1, (Winter 1996), 163-180, 165.

<sup>34</sup> Habermas, *Legitimation Crisis*, 70-71.

<sup>35</sup> Habermas explains this process on 71-75 of *Legitimation Crisis*. He presents an interesting example of how child-rearing routines, formerly private matters, have become problematized. Nixon also wrestled with this problem, indicating that he was worried about committing "the vast moral authority of the national government to the side of communal approaches to child rearing over against the family-centered approach." Cited in William V. Shannon, "A Radical, Direct, Simple, Utopian Alternative to Day Care Centers," *New York Times Magazine*, April 30 1972. Copy contained in President's Handwriting - June 1-15, 1972, Box 17, WHSF: POF: President's Handwriting, NPMP.

<sup>36</sup> "The stirring up of cultural affairs that are taken for granted thus furthers the politicization of areas of life previously assigned to the private sphere. But this development signifies danger for the civil privatism that is secured informally through the structures of the public realm. Efforts at participation and the plethora of alternative models – especially in cultural spheres such as school, university, press, church, theatre, publishing, etc. – are indicators of this danger, as is the increasing number of citizens initiatives." (*Legitimation Crisis*, 72.)

<sup>37</sup> Alan Wolfe, *Limits of Legitimacy: Political Contradictions of Contemporary Capitalism* (New York: Free Press, 1977), 258.

<sup>38</sup> Habermas, *Legitimation Crisis*, 37/38.

<sup>39</sup> It might be objected that, at least since the Wagner Act, the latter responsibility had already been assumed by the government.

## Section II

### THE NIXON REFORMS

Nixon was not a natural reformer. Recoiling at the prospect of having to sign the constitutional amendment giving 18-20 year-olds the right to vote, he posed a number of alternative solutions to the crisis affecting youth. He gave a rather tall order to his speechwriter Pat Buchanan who was put in charge of creating “a new conservative youth movement.” Nixon commanded Buchanan to “Make it ‘out’ to wear long hair, smoke pot and go on the needle. Make it ‘in’ to indulge in the lesser vices, smoking (cigars, preferably - non-Castro!) and alcohol in reasonable quantities on the right occasions.”<sup>1</sup> How much success Buchanan had in leading the youth of America away from its vices is not indicated in the files. After observing the popularity of Woodstock and other rock music festivals, plans were afoot to organise a concert that would no doubt have attracted, well, scores of youth. A White House “salute to youth” planned to have as its main attractions the “Mike Curb Congregation,” and the Partridge Family!<sup>2</sup> Relinquishing these strategies, attractive as they were, the presidential Nixon decided – sensibly – to sign the constitutional amendment.

The incorrigibly political Nixon is also well known. Always on the lookout for new constituencies or new ways of relating to voters, a memo contained in files marked “President’s Handwriting” gives some indication of just how far Nixon would go. One of Nixon’s aides, Henry C. Cashen, wrote a memorandum regarding a meeting with the winners of the Seventh World International Bowling Federation



Tournament. Cashen noted that there were then 52 million American bowlers, according to the latest poll. Nixon circled the figure and wrote, "H- note." At least three letters followed instructing senior staff to note there was 52 million bowlers in the US. Nixon duly had a publicity shot of himself bowling passed to the press. Unfortunately, the White House was flooded with letters from bowlers pointing out that the President was cheating – he had his foot over the fault line! A promising political constituency had to be abandoned.<sup>3</sup>

Nixon was, of course, forced to compromise his conservative and political sensibilities on many occasions. In foreign policy, the anti-communism with which Nixon had sustained his career and in which he continued to believe into the 1990s had to be put aside. As he put it in a meeting recorded by the assiduous taken down by Charles Colson, the up-and-coming White House aide who became famous after the Watergate revelations: "Balance of Power Politics - keep balancing power centers acc. to self interest and [their?] self interest - Pragmatic, cold, calculating - only way now with rising power of Japan economically, China militarily - only way now to maintain peace - before it was possible with policy of containment - no longer a practical possibility."<sup>4</sup> The same thing occurred in domestic policy. When one of Ehrlichman's underlings wrote to him complaining that "at least as far as domestic legislation is concerned, I believe that an image has been created that the President doesn't really believe in some of the things he has propose...", Ehrlichman noted, presumably only to himself, that "Problem here is - he doesn't."<sup>5</sup> Even regarding school desegregation, where it appears obvious that Nixon played to the hostility of his Southern white constituents, contradictory impulses were in evidence. In a meeting with Ehrlichman regarding school desegregation, Nixon worried

that “(i)t may not work. Wallace and others may stir it up - Don’t tell me there may be good politics in this.” His responsibility, he said, was “not to let the country come apart - it won’t on this Goddamn issue or this silly decision.” He added, “Don’t be the aggressor with the South in an agonizing experience - the racist dogs will be in full cry & will effect the decent people.”<sup>6</sup>

There are few areas within the Nixon administration more contradictory and confusing than civil rights. The Nixon administration boosted nonmilitary racial and ethnic minorities among federal workers to 19.5 percent; more than doubled aid to black colleges and increased minority business aid by 152 percent. The percentage of black children in all black schools decreased from 40 percent in 1969 to 12 percent in 1972, effectively desegregating more children than had all previous administrations since the 1954 *Brown* decision combined.<sup>7</sup> Topping Clinton’s attempt to gather a cabinet that “looked like America,” Nixon offered Housing and Urban Development (HUD) to the head of the Urban League, Whitney Young, and the US ambassadorship to the United Nations to black Republican Senator Edward Brooke of Massachusetts. While Young and Brooke declined the offer, James Farmer, one-time executive director of the Congress on Racial Equality (CORE) accepted a job as undersecretary of Health, Education and Welfare (HEW) in 1969. Nixon also appointed Walter Washington as the first black Mayor of Washington.<sup>8</sup> Nixon enthusiastically backed the creation of a “Negro history week.”<sup>9</sup> Yet, when asked to establish a holiday in honour of Martin Luther King, he wrote “No, Never.”<sup>10</sup> He referred to “these little Negro bastards on the welfare rolls at \$2,400 a family,” hardly the language of a sympathiser.<sup>11</sup> He also maintained that blacks were genetically inferior to whites, could never hope to achieve parity and that there had

never been an adequate black nation.<sup>12</sup> He depended on segregationists like Strom Thurmond for support, used the coded language of “law and order” to play on racial fears, attacked busing to achieve racial balance in schools and even voiced opposition to “quotas” in the run-up to 1972.

Perhaps the most enduring program of Nixon’s civil rights legacy is his initiation of not just one but many affirmative action programs. Several points will be made below. Chapters six and seven show that Nixon’s implementation of the Philadelphia Plan was only one of many contributions made by his administration to the development of affirmative action. The Philadelphia Plan itself was not particularly successful and its contribution to the institutionalisation of affirmative action has been overstated. Many other policies more closely related to modern affirmative action policies have been neglected by historians. Taken together, these policies represented a strategy implemented by Nixon and his administration for making civil rights practical by using the growing financial muscle of the federal government to force those dependent on government contracts and aid to hire a proportion of minorities (and later women) in their workforces. Viewed in this way, policies other than the Philadelphia Plan proved more important for providing models for future affirmative action programs.

Chapter seven demonstrates the effect Nixon had on newly emerging affirmative action policies by changing the direction of civil rights policy in 1970. Chapter eight explores the evidence available on Nixon’s personal convictions and feelings on racial issues. Though Nixon is often viewed as a moral cipher in light of Watergate, his consistent espousal of something resembling the Protestant Work Ethic

allowed him to put energy and conviction into the battle to save the Philadelphia Plan and to oversee the rapid expansion of many affirmative action programs.

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<sup>1</sup> Memo for Pat Buchanan from the President April 21 1970, Memos - April 1970, Box 2, Folder 1 of 6 [Documents from Boxes 1-9] Contested Files: WHSF: SMOF: President's Personal Files, NPMP.

<sup>2</sup> Memo to Dwight Chapin and Alex Butterfield from Constance Stuart, September 2 1971, H. R. Haldeman June-Dec 1971 [1 of 3], Box 3, WHSF: SMOF: Charles W. Colson, NPMP.

<sup>3</sup> Memorandum for the President from Henry C. Cashen, no date, President's Handwriting September 16 thru 30, 1971, Box 13, WHSF: POF: President's Handwriting, NPMP.

<sup>4</sup> Colson written notes, June 16, Presidential Meetings and Conversations [6 of 6], Box 18, WHSF: SMOF: Colson, NPMP.

<sup>5</sup> Memo for Ehrlichman from Ken Cole, Aug 3 1971, JDE Notes of Meeting with the President - 1/5/71 to 4-21-71 Box 5 [6 of 6], Ehrlichman "Scrapbook" Items [Memoranda from the President][1 of 2], Folder 2 of 5 [Boxes 16-22], Contested Files: WHSF: SMOF: Ehrlichman, NPMP.

<sup>6</sup> Handwritten notes of a meeting held on 4/21/71, JDE Notes of Meeting with the President - 1/5/71 to 4-21-71 Box 5 [6 of 6] Contested Files, Box 1 [Documents from Boxes 3-14]: WHSF: SMOF: Ehrlichman, NPMP.

<sup>7</sup> Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960-1972* (Oxford University Press, 1990), 446-7.

<sup>8</sup> Stephen E. Ambrose, *Nixon, Volume II: The Triumph of a Politician 1962-1972* (London: Simon and Schuster, 1989), 236. Melvin Small, *The Presidency of Richard Nixon* (Lawrence, KA: Kansas University Press, 1999), 36.

<sup>9</sup> Memo from David N. Parker to Haldeman, Feb 8 1971, Box 3, WHCF; Subject Files HU [Ex] HU, NPMP.

<sup>10</sup> News Summaries - January 11 1970, WHCF: POF: Annotated News Summaries, NPMP.

<sup>11</sup> Cited in "All the Philosopher King's Men," from a May 13 1971 taped conversation between Nixon, Haldeman and Ehrlichman transcribed by James Warren, *Harper's Magazine*, (February 2000), 22-24, 22.

<sup>12</sup> John D. Ehrlichman, *Witness to Power: The Nixon Years*, (New York: Simon and Schuster, 1982), 222, 223, H.R. Haldeman, *The Haldeman Diaries* (Sony CD-ROM, 1994), April 28 1969, H Notes Jan - June '69 [Jan - April 1, 1969] Part 1, Haldeman Notes: Box 40, WHSF: SMOF: H. R. Haldeman: Haldeman notes, NPMP.

## Chapter 6

# THE PHILADELPHIA PLAN, ORDER NO. 4 AND THE ORIGINS OF AFFIRMATIVE ACTION

Most texts dealing with affirmative action assume the 1969 Philadelphia Plan, which required all contractors working on large federally funded projects to adopt “numerical goals and timetables” to assure the desegregation of their workforces, was the forerunner of the affirmative action programs still in place today. Jill Quadagno, author of *The Color of Welfare*, argued that “the Philadelphia Plan worked” in creating black employment and in instituting successfully affirmative programs.<sup>1</sup> Hugh Davis Graham, whose texts on the history of civil rights policy appear in the footnotes of every text dealing with the issue since *The Civil Rights Era* was published in 1990, notes that, after Nixon’s effective defence of the Philadelphia Plan in December 1969, “(t)he tide of affirmative action thereby turned sharply towards minority preferences.” However, Graham cites the obscure bureaucratic Order No. 4, the order issued by the Labor Department on January 23 1970 that extended the requirements of the Philadelphia Plan to nearly *all* government contractors, as being that which universalised affirmative action in the United States.<sup>2</sup>

Although Graham is right to mark Order No. 4 as an important historical precedent, it is possible that the Philadelphia Plan and Order No. 4 acquired much of their importance in hindsight. This chapter will argue that the significance of the Philadelphia Plan and Order No. 4 has been overstated. First, neither the Philadelphia Plan nor the “hometown solutions,” voluntary plans modelled on the Philadelphia Plan agreed in other

urban areas, can be regarded as successes. Progress, when it existed, was painfully slow. Most of the original “hometown plans” were torn up and rewritten within a year of being implemented. Progress for blacks employed in the construction industry took place in tens rather than in thousands of jobs. The impact of the Philadelphia and hometown plans upon black employment in the inner-cities at a time when the construction industry suffered under the recession of the early 1970s was, not surprisingly, negligible. There is no evidence that Order No. 4, despite its near universal coverage, was implemented as anything more than an attempt to placate the construction industry by extending its strictures to other industries. As far as the records show, Nixon never mentioned Order No. 4 and seldom mentioned the Philadelphia Plan after the battle in Congress in December 1969 to have it rescinded. Up until September 1971 (at least) not one contract had been cancelled nor had any contractor been debarred under the Philadelphia Plan or Order No. 4 despite many calls from such organisations as the Congressional Black Caucus for stricter implementation<sup>3</sup> and the fact that, as the Civil Rights Commission observed, “violation of the Philadelphia Plan has been widespread.”<sup>4</sup>

Second, the Philadelphia Plan, designed to combat black unemployment in the ghettos, was effectively shelved by the Nixon administration almost as soon as it was implemented. Nixon’s rethink of civil rights strategies in 1970, to be discussed later, shifted policies away from the ghettos and towards those that could “help themselves” – the black middle class. Nixon really only mentioned the Philadelphia Plan when his administration’s civil rights record was being attacked. Few others thought that the Philadelphia Plan was significant at the time. It was less contentious than open housing and certainly less contentious than busing to achieve racial balance – the issue of the day

during Nixon's first term. Even within the issue of equal employment, a more prominent issue was whether the Equal Employment Opportunities Commission (EEOC) would have "cease and desist" powers or just the power to bring cases to the courts. The Plan was insignificant to the Democratic Party at the time, so much so that they were willing to outlaw preferential hiring and, therefore, scrap the Philadelphia Plan, in return for cease and desist powers for EEOC in 1972 (to be discussed later). Had they succeeded in their attempt, a much different history would now be being written. (This anomaly between the arrival of such a significant piece of legislation and the deafening silence from those who would later praise or decry affirmative action will be explored in the final chapter that looks at affirmative action as an issue, separate from its existence as a policy). We may also observe that the idea of racial preference contained within the Philadelphia Plan was in no way new. As has been discussed previously, the concept of racial preferences had existed for some time and a quota-system was in the process of being implemented in the Democratic Party when the Philadelphia Plan was being readied for implementation.<sup>5</sup>

The real significance of the Philadelphia Plan was in the Congressional battle against it. Here, it is possible to see that the majority of the political and business elite (or, to use C. Wright Mills' term, the "power elite"<sup>6</sup>) had now been won over to the need for a new race relations strategy. The nearly unanimous insistence in 1964 that quotas were unnecessary and undesirable, that American business, unions, schools, colleges and political parties were inherently fair institutions that would naturally reform themselves (as discussed in Chapter 4), could not be maintained in the post-riot race relations climate. The idea of merit – so important for defences of American institutions

against charges of unfairness – was losing its predominance within the American culture. Even American business began to ask the government to intervene in business and social practices that now appeared outdated. The battle in Congress showed this to be so.

### What was the Philadelphia Plan?

Originating in 1967, the Philadelphia Plan hoped to break the grip of lily-white unions on the construction trades in Philadelphia. These highly-paid skilled crafts included sheet-metal workers, plumbers, roofers, structural ironworkers, steamfitters, and elevator constructors and had a combined membership of between 8500 and 9000, including 700 apprentices. Altogether, these locals made up only about four percent of the area's union members and just over a tenth of Philadelphia's unionised construction workers. A survey done at the time revealed that most local construction unions had "sizable minority memberships." However, these few offending locals remained defiantly lily-white, highly paid and highly visible.<sup>7</sup> By minorities, the Philadelphia Plan meant a group of individuals "who, by virtue of past discrimination, continue to suffer the present effects of that discrimination...."<sup>8</sup> The question of who constituted a minority was not made clear in the original documents regarding the Philadelphia Plan. However, contained within a memo dated December 15 1969 is an indication of which groups might be called minorities: Negroes, Puerto Ricans, American Indians, Spanish Americans, Asians, Eskimos and Aleuts. However, the memo stated that "(t)his classification serves as a guide primarily for record-keeping purposes and any disadvantaged person would be eligible."<sup>9</sup> There is no reason to think that the



Philadelphia Plan used any different criteria. At this stage, those charged with drawing up affirmative action programs drew back from the implication that the inclusive terms of the Great Society might be narrowed.

The goal was to force integration on six offending locals in Philadelphia by concentrating irresistible economic leverage on the region's builders. The method was to set no firm target numbers (this would suggest illegal quotas<sup>10</sup>) but to hold up contracts until bidders submitted detailed manning tables that listed specific numbers of minority members they promised to hire. Contractors who submitted the lowest bid after all contractors received the same pre-bid specifications were termed "apparent low bidders" while their manning tables were examined, after which the contract could be signed.<sup>11</sup>

Sanctions, provided in Johnson's 1965 executive order, 11246, included cancellation of existing contracts and debarment from any further contracts with the Federal government.<sup>12</sup> Despite the Plan being forced upon the city of Philadelphia, the Nixon team would rationalise it as voluntary, economic arm-twisting rather than a quota system. First, it insisted on specific affirmative action plans only from federal government contractors employing members of the six offending unions. Secondly, sanctions could be avoided if the contractor showed a "good faith effort" to achieve the goals contained in the affirmative action plan. In other words, even if specific numbers of minorities had not been hired, the contractor could show that he had tried to achieve the target.

## The Background to the Philadelphia Plan

The origin of the Philadelphia Plan lies in the attempts of the Department of Labor under both Johnson and Nixon to alleviate racial tensions within the construction industry. Johnson's Executive Order 11246, issued in September 1965, abolished the old President's Committee on Equal Employment Opportunity (PCEEO) and created the Office of Federal Contract Compliance (OFCC) in the Department of Labor. The construction industry created some special problems for Johnson's newly formed OFCC when it began operating in 1965. On the one hand, there were few more visible situations more egregious to local black populations than exclusively white construction workers undertaking building work in largely black communities. In Philadelphia, a racial clash in which 39 people were injured broke out in 1963 when pickets led by the local NAACP chapter sought to close down a school construction site in protest at the white monopoly in the construction trade. In Westchester, New York, protests erupted during the winter of 1966-67 when protesters demanded that blacks be given a share of the construction jobs involved in building a mall in New Rochelle.<sup>13</sup> The issue of union discrimination, while not new, had previously been avoided in the interests of Democratic Party unity. Both the unions and the civil rights movement were pillars of the Democratic Party coalition and the prospect of a protracted war between them could only harm Democratic interests. These protests, however, proved hard to ignore, especially after the Watts riot in August 1965 pointed towards the cities as the epicentres of race relations problems.<sup>14</sup>

Second, the structure of the construction industry presented problems for the government. It operated through *hiring halls*. For most employees in the construction industry, seniority with a single employer did not exist. Contractors hired whatever labourers they needed from the hiring halls for specific projects then discharged them. The employee then returned to the hiring hall to await another project that needed that employee's specific skills. Seniority normally decided the order in which workers with similar skills were hired.<sup>15</sup> Craft unions had exclusive jurisdiction over particular skills within a given territory. Employers were not free to hire from outside the union hall, having signed exclusive contracts with the union involved. New employees were, in general, referred by existing employees to the hiring hall where they would begin an apprenticeship program administered within a particular area by a Joint Apprenticeship Program made up of union and employer representatives. Apprenticeship programs were subject to regulation by the Bureau of Apprenticeships and Training within the Department of Labor, set up in the 1930s to regulate relations between workers and contractors and generally made up of ex-union officials. Apprenticeships for skilled trades generally took between three and five years.<sup>16</sup> Furthermore, the parties ostensibly governed by Title VII of the 1964 Civil Rights Act were numerous. Construction contracts were generally let to a general contractor who subcontracted out most of the work to several specialised contractors. Federal assistance did not go directly to construction companies but went through local "applicants" who were usually units of local government. Thus the activities of various unions, several levels of contractor, the Joint Apprenticeship Programs and whatever federal, state or local agencies were involved needed to be policed.<sup>17</sup>

Government action against recalcitrant contracting companies proved successful in the case the Newport News Shipbuilding and Drydock Company in 1966, as has been noted above.<sup>18</sup> But in the construction agency, because of its specific structures, progress in terms of black employment was glacial. These practical problems, along with the unwillingness of the Democrats to risk alienating either of its constituencies, meant that little was accomplished in the way of equal employment within the construction industry during the Johnson presidency. “One of the practical problems of the contract compliance program [set up by EO 11246] was its failure to delineate in detail the extent of the affirmative action obligation.”<sup>19</sup> Between 1966 and 1968, the Office of Federal Contract Compliance (OFCC), created by Johnson’s EO 11246 in September 1965, was wrecked on the same rocks that had sunk its ineffective predecessors. Again, the question of how to enforce affirmative action was left unanswered. The agency began to look at new means of enforcement, especially within the very visible construction industry. Originally, the agency attempted to force construction contractors to employ minority labor in terms to be negotiated *after* a contract was awarded. The Comptroller General, the official appointed by the President and charged with ensuring that Congress’s interests were looked after in government contracts, objected that the scheme was a violation of the rules of competitive bidding. In May of 1966 the OFCC established a *pre-award* program for the construction industry only. In doing so, it hoped to avoid confrontations with each of the separate organisations involved in the contract. (This method was no radical departure, however. The language in Executive Order 11246 specified that bidders should file compliance reports before, or as an initial part of, their bids.) In 1967, the OFCC made its first attempt to implement the program in St. Louis.

However, a Justice Department suit effectively threw a spanner into the works. A construction company, working on a National Park Service site, hired a black plumber and two black helpers who were not members of AFL-CIO Plumbers Local 35. A walkout by five locals of the Construction Trades Council prompted the Justice Department to initiate a pattern-or-practice suit. Amongst a complex and drawn out suit, the OFCC's new program could not be tested normally.<sup>20</sup>

In San Francisco, huge federal investment in the Bay Area Rapid Transit (BART) system meant that OFCC leverage could be brought to bear. But the San Francisco plan specified no numbers or other standards against which employers could be judged. According to Graham, the area was a union stronghold and the indirect style of confrontation adopted by the union – where, on paper, compliance was fulsome but not matched by numbers employed – stymied the agency. In Cleveland, a local contractor pursuing a NASA contract offered in June 1967, after some coaching within pre-award negotiations, to provide a “manning table” specifying the numbers of minorities to be hired in each trade. By mid-November 1967, other contractors had promised, in response to delays in awarding \$83m in Cleveland area contracts, to hire 110 minority craftsmen out of total crews of 475 in the mechanical trades and for operating engineers. The problem here was that there was little local involvement and thus little conception amongst black groups that anything had been achieved through local participation.<sup>21</sup>

Johnson's Secretary of Labor, Willard Wirtz, was informed of a local initiative in Philadelphia by an obscure interagency board, the Federal Executive Board, which had the purpose of co-ordinating the disjointed programs of federal agencies in Philadelphia (similar boards existed in other US cities). The plan was to integrate some of

the city's exclusively white construction unions. The plan targeted unions that held only four percent of the area's 225,000 union members, about a quarter of whom were construction workers. The eight offending locals in Philadelphia were in relatively high-paying trades: electrical and sheet-metal workers, plumbers, roofers and water-proofers, structural iron-workers, steamfitters, elevator constructors and stone masons (a tiny union that was later dropped as being insignificant). Taken altogether, these eight unions had less than one percent minority workers. In the plan, the contract compliance committee would set no firm targets, as this would suggest illegal quotas. Instead there were ranges of four to eight percent were set for 1970, nine to 15 percent for 1971, 14 to 20 percent for 1972 and 19 to 26 percent for 1973. The vacancy rate in the construction industry in Philadelphia was assumed to be seven and a half percent per year.<sup>22</sup> Contracts would be held up until bidders submitted detailed manning tables that listed by trade the specific numbers of minority workers they pledged to hire. The plan affected the existing arrangements whereby unions would provide through "hiring halls" the required number of workers to contractors.<sup>23</sup>

The advantages of this plan over the others were that it was locally led and co-ordinated but, even more saliently, contractors became responsible for hiring their stipulated quotas of minorities, whatever the unions' hiring hall policies. The federal government, therefore, was one removed in the chain of command. Additionally, without the complex negotiations between different federal agencies and the necessity of imposing a plan from outside entailed in federal initiatives, the local initiative seemed more likely to work. If Wirtz needed more compelling reasons for giving the go ahead for this plan, they came in the form of massive riots that erupted throughout many American

cities when the plan was being considered in the summer of 1967. Relations between Philadelphia's two million blacks and its white citizenry, tense before the third summer of rioting, seemed to be at breaking point.

The legal test of the Philadelphia Plan actually began in Cleveland. The first test cases were filed and litigated. Jones indicates that it was Cleveland that provoked the first resistance: "It was against this backdrop that the screams of 'quotas' began to be heard..."<sup>24</sup> By the time copies of the Philadelphia Plan were circulated, however, the head of the Associated Contractors of America, William Dunn wrote to all chapter presidents of the Association of General Contractors to organise a campaign in opposition.<sup>25</sup> There is little evidence that the plan was adopted as anything other than emergency measure to reduce tension within some urban areas. Certainly, Wirtz was willing to back away from the plan in the face of the builders' opposition, especially when the Department of Labor's relationship with organised labor looked increasingly fragile after the AFL-CIO became more aware of the plan. If the plan was intended as a model for future Equal Economic Opportunity activity or as a new definition of affirmative action, the conceptual framework was somewhat undermined when Wirtz claimed in a speech to the AFL-CIO's Building and Construction Trades Department that the situation in Cleveland and Philadelphia had got to the point where "symbolism was more important than substance, evidence more important than equity." He promised them that Philadelphia was an exceptional case. John Macy, chairman of the Civil Service Commission, assured anxious members of Congress in January 1968 that "There are no intentions to implement such a plan on a nationwide scale."<sup>26</sup>

Peter G. Nash claims that 1400 minority workers were brought into the Philadelphia area construction industry as a result of the first Philadelphia Plan.<sup>27</sup> However, when opposition to the Plan grew the Federal government abandoned it. Johnson was diverted by an agreement that occurred in early 1968. The Model Cities law of 1966 required that ghetto residents be give “maximum opportunities” to participate in the building efforts to rehabilitate the slums. Construction unions, happy at the prospects of a building boom, agreed to train underqualified slum dwellers in new, government funded “trainee” categories. It was much better for the entire program to have labor in a co-operative mood; with a projected building boom, labor would be able to hold the program to ransom. The Philadelphia Plan was rescinded with the result that “many of the 1400 beneficiaries did not remain on Philadelphia area construction sites.”<sup>28</sup>

The lame duck administration, its attention elsewhere, did not stand up to opposition to the plan. The key opponent that stopped the Plan from being implemented was the unlikely Elmer Staats, the Comptroller General of the US. On November 18 1968 Staats, having ruled before that post-award contractual stipulations were illegal, now stated that all pre-award contractual requirements not specified would be disallowed. Contracts could only be awarded on the basis of a low bid and must include any specific requirements. What he objected to was the withholding of requirements until *after* a bid had been accepted, which he saw as unfair to the bidder. The Department of Labor failed to challenge the ruling.<sup>29</sup>



## Nixon to the Rescue

Only the incoming Nixon administration saved the Plan. To the surprise of civil rights activists, the new administration, elected eleven days before Staats handed down his ruling, made some effort to resuscitate the Plan. Secretary of Labor-designate George P. Shultz, a tough-minded professor of Labor Relations from the University of Chicago, announced on December 30 1968 to the Industrial Relations Research Association that the nation's most important problem was black unemployment - above productivity, inflation and industrial unrest. He spoke of the need for special measures and claimed that, in the new, straitened circumstances employers "cannot conduct business as usual."<sup>30</sup> Shultz hired black Republican entrepreneur Arthur Fletcher, a former professional football player who had lost the electoral race for lieutenant governor in Washington the previous year, as Assistant Secretary of Labor. Fletcher's main brief was to iron out the problems of the Philadelphia Plan. He sought to overcome the difficulty posed by Staats by creating, in the invitation for bids, suggested ranges of targets for minority employment within which contractors could choose their own specific targets. Staats repeated his key arguments against this "Revised Philadelphia Plan" – contractors must know all requirements before putting in a bid. Department of Labor counsel Lawrence H. Silberman prepared a 44-page legal brief to defend the revised plan, arguing that Staats' objection to post award-negotiations was illegitimate as pre-award goals for minority hiring in the form of percentage ranges provided ample guidelines for contractors to draw up their own affirmative action plans. Silberman's report was released by Labor on July 16 1969. Staats agreed with Silberman on this

point. But, as Silberman had anticipated, Staats' further objections came over the ban on minority quotas in the Dirksen amendment in Section 703(j) of Title VII of the 1964 Civil Rights Act. Silberman pointed out that an affirmative action program existed under Kennedy's EO 10962 *before* the passage of the Civil Rights Act. He further argued that targets were not prohibited under Title VII, only quotas or preferential hiring. He further pointed out that Congress had defeated an amendment by Senator John Tower (#962) that would have made Title VII the *exclusive* federal remedy for employment discrimination, removing any role for the President. In doing so, Congress implicitly approved the President's program to combat racial discrimination in employment.<sup>31</sup>

Hearings in Philadelphia occurred on August 26 and 27 1969, after Fletcher had announced the new order on June 27. Confidently, Shultz announced on September 23 that other plans called "hometown solutions" would operate similarly to the Philadelphia Plan but would be tailored to the specific needs of cities. Opposition in Congress grew, however, particularly from the guardian subcommittee on Separation of Powers, headed by North Carolina Democrat Sam Ervin. On October 26 and 27, the subcommittee ostensibly discussed S.931, Republican Senator Paul Fannin's bill to suspend the use of Johnson's EO 11246 and make Title VII the sole means of EEO enforcement. However, Fannin's bill would have created a massive discussion on civil rights, which would have had the effect of rallying the more numerous civil rights liberals to the cause of defeating Fannin's bill. A simpler way of defeating the Philadelphia Plan was to attach a rider to a minor Senate appropriations bill concerning damage by hurricane Camille that stated that no congressional appropriation shall be available to finance, either directly or indirectly through any Federal aid or grant, any contract or

agreement which the Comptroller General did not approve. The rider had been proposed by another Southerner, West Virginia's Democratic Senator Robert Byrd.

### **"Demonstrable Deeds" and The Battle in Congress**

Perhaps the most curious aspect of the debates on the Philadelphia Plan in both Houses of Congress in December 1969 was the unwillingness of many on either side of the debate to discuss the Philadelphia Plan itself. It was as if participants recognised the dilemma posed by affirmative action and wished to avoid it in discussion. Those opposing the Philadelphia Plan attempted to steer the debate away from a general civil rights discussion and towards a discussion about the balance of power between Congress and the Executive or towards a formal discussion of the implications of the 1964 Civil Rights Act. Samuel J. Ervin had been the force behind the attacks on the Philadelphia Plan as chairman of the confusingly-titled (but important nonetheless) Subcommittee on Separation of Powers of the Committee on the Judiciary. The committee held hearings on the Philadelphia Plan on October 27-29 1969. In his opening statement, Ervin assured members that "During the next two days, our purpose will not be to debate the wisdom of the Philadelphia Plan..."<sup>32</sup>

On December 18 the conservative forces launched a successful surprise attack on the Philadelphia Plan. Though congressional conservatives did not command the authority they had at the time of the passage of the 1964 Act, they still knew a few tricks of the trade. Southern Democrats, ensconced in powerful congressional committees by virtue of seniority, had managed to stave off attempts at liberalisation by more liberal

Democrats up until 1964. Now they had been undermined by the apparent contradiction between their stalling aims and the serious social consequences manifested in the consecutive summers of rioting that many blamed on the delaying of racial reform. However, though no longer the force they once were, they certainly retained the guile of congressional old-timers.

The rider they introduced gave veto power to the Comptroller General over any program involving contracts.<sup>33</sup> The sides of the battle were also confusing – the issue split both parties. Those supporting the rider (and thus opposing the Plan) included Southerners opposed to further civil rights legislation, those with political ties to labor, and a number of congressmen opposed to what they saw as usurpation of powers previously held by congress by the White House. The debaters on both sides of the question tried to distance themselves from any position on the Philadelphia Plan. Whatever else this congressional battle demonstrates, however, the contribution of Nixon towards saving the plan proved crucial.

Using the political gauge devised by A. James Reichley in his assessment of the congressional power politics during the Nixon and Ford administrations, it is possible to see how the parties divided<sup>34</sup>:

REPUBLICANS	DEMOCRATS
Fundamentalists	Traditionalists
Stalwarts	Centralists
Moderates	Regulars
Progressives	Liberals

In opposition to the rider (and thus in favour of the Philadelphia Plan) were Republican Moderates and Progressives along with Democratic Regulars and Liberals. Southern Republicans like Strom Thurmond of South Carolina and John Tower of Texas as well as a string of non-southern Republican conservatives like Barry Goldwater and Paul Fannin of Arizona – joined forces with southern Democrats and those with close ties to labor. Many Republican stalwarts, whom Reichley characterises as not opposing change but anxious for it to come very slowly, also voted for the rider. These included Senators Roman Hruska and Carl T. Curtis of Nebraska, Norris Cotton of New Hampshire, Milton R. Young of South Dakota and Bob Dole of Kansas, who would later defend affirmative action when standing as Republican candidate for President. Missing, having died a few months earlier, was the man who negotiated the stipulation against proportionally based hiring in Title VII of the 1964 Civil Rights Act, Republican Senate Minority Leader Everett Dirksen. Dirksen had been a key force against the Philadelphia Plan during Johnson's tenure.

Aligned against the rider in the Senate were what Reichley termed the "Republican Moderates" such as Senator Henry Cabot Lodge, Jr., and Hugh Scott of Pennsylvania. According to Reichley, these Senators were prepared to accommodate change but seldom initiated it. They were managerial and pragmatic. Nixon's political origins were from this camp. The Republican Progressives – a small but powerful bloc – also joined the defense of the Philadelphia Plan. Nelson Rockefeller, their banner-carrier in later days, Jacob Javits, Mark Hatfield, Charles Percy, William Scranton, Daniel Evans, and Richard Ogilvie all opposed the rider. Democratic Regulars and Liberals,

looking at the Philadelphia Plan as part of efforts to strengthen black civil rights, joined Nixon's unlikely cavalcade.<sup>35</sup>

Those supporting the rider had at least one powerful weapon on their side. In the discussion around Title VII of the 1964 Civil Rights Act, the prohibition against quotas had been made very clear. The relevant section read:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed... in comparison with the total number or percentage of [such] persons... in any... area, or in the available work force in any ...area.<sup>36</sup>

The inclusion of this stipulation within the Act had been unproblematic in the run-up to its passage in 1964. The aforementioned discussions on the above amendment to the original bill, introduced by Everett Dirksen, indicates that liberals saw it as reasonable. In 1964 few believed that merit-based hiring programs constituted a barrier to black equality. Even if some did, the Democrats' reliance on support from the unions and employers organisations for civil rights measures made it seem tactically inept to insist on rewriting existing seniority systems.<sup>37</sup>

The situation in 1969 had changed radically, however. Changes much deeper than simply a realignment of congressional partisanship were occurring. No longer were the forces that had argued out the 1964 Act in existence. The coalition that Bayard Rustin identified as the power behind the Democrats' civil rights activism – “Negroes, trade unionists, liberals, and religious groups,” had fragmented under the immense pressure of the failure to meet the expectations that the civil rights movement had generated.<sup>38</sup> The institutions that nearly all Americans had seen as the vehicles upon

which racial equality would ride, the schools, political assemblies, political parties, labor assemblies and churches trumpeted by Gunnar Myrdal in the 1940s, lost nearly all their authority and influence over racial issues after consecutive summers of rioting emphasised their powerlessness to allay the racial crisis. As the pundit Gary Wills put it, “(t)here was a sense everywhere, in 1968, that things were giving. That man had not merely lost control of his history, but might never regain it.”<sup>39</sup> By 1969 the imperative to restore racial peace and calm inside the ghettos remained while these institutions fought for their own survival.

## December 18

Liberals were taken by surprise when the minute rider was proposed by Democratic Senator Robert Byrd of West Virginia. Byrd evidently hoped that Senators would pass the supplemental appropriations bill quickly in order to join their families for the Christmas holiday: “I know all Senators want to get home. Senators have reservations on planes. We all want to get home to see our families. There is an excellent chance that we can get out of here sine die Saturday night if we can pass this bill today.”<sup>40</sup> Republican Senators Jacob Javits from New York, Edward Brooke from Massachusetts, Hiram L. Fong from Hawaii and Hugh Scott of Pennsylvania, joined by Democrats such as Senator John O. Pastore from New Jersey, fought a rear-guard action against the rider. Fong argued first that the rider should not have been debated; the Philadelphia Plan should have been debated before the rider was attached. He also attempted to steer the debate towards a general civil rights discussion and away from the specifics of the

Philadelphia Plan. “The discussion surrounding the negotiations of such voluntary plans (hometown plans based on the Philadelphia Plan model) as well as the implementation of those plans have provided a significant channel for civil rights tensions.”<sup>41</sup> Javits, taking a different tack, insisted that the Philadelphia Plan was not the real target of the rider – it was an attack on many civil rights measures. The Philadelphia Plan was not particularly important, he said: “This would be Napoleon Bonaparte with grapeshot clearing the whole street and not just the Philadelphia Plan.” “...I thought it proper at the threshold to question why this 155 millimetre howitzer is used to knock off a small target, the Philadelphia Plan.” Later, he stated plainly that he would “much rather that it would say that the Philadelphia Plan is a nullity.” He also declared that the Davis-Bacon Act, governing wage determination, would be negated by the rider, paralleling Ervin’s declaration three days previously that the Philadelphia Plan would contravene the Taft-Hartley Act.<sup>42</sup> Hugh Scott raised the issue of rioting in his contribution to the discussion: “The last thing I want to see in America is people to think that the laws are not adequate, that the protection of the law has failed them, and that, therefore, there remains for them only this dreadful abitrament of confrontation through violence.”<sup>43</sup>

The pro-rider forces, taking their lead from Ervin, argued that they were simply insisting on a strict interpretation of the law or that the dismissal of the Comptroller General’s objections was essentially a power-grab by the executive. The Philadelphia Plan was beside the point. Roman Hruska of Nebraska submitted that “it is not only the Philadelphia Plan that is involved.” Pearson pleaded that “I do not want my comments to indicate any lack of enthusiasm for any plan, whether it is the Philadelphia Plan or not.” Republican Senator Gordon Allot of Colorado, supporting the rider, insisted



that “I support what the President is trying to achieve through the implementation of this plan... The question here is not – and I want to make this clear – the correctness of the Philadelphia Plan.”<sup>44</sup> Liberals supporting the rider often did so because they supported or were sponsored by organised labor – the older dividing line between liberals and conservatives – and seemed unwilling to admit that the new issue upon which conservatism and liberalism would have to define themselves was race. The Philadelphia Plan, in that it removed from the control of unions the question of hiring or, indeed, membership of the unions themselves, attacked directly their authority. However, the absence of debate outside this arena indicates that by this time labor’s influence was on the wane. Some southerners such as John McClellan of Arkansas insisted that the 1964 Civil Rights Act had been contravened.<sup>45</sup> Most, perhaps, wished to avoid the obvious irony of insisting on the letter of a law they had fought so hard to defeat.

Despite a concerted defence, the conservatives triumphed in this first vote. By a vote of 52-37, the Senate voted that the rider was germane to the bill concerning Hurricane Camille.<sup>46</sup> Once the question of whether the rider was germane to the bill was lost, Javits attempted to include an amendment that struck out the period (full-stop) at the end of the rider and adding “and actions hereunder shall be subject to judicial review as provided by Chapter 7 of Title 5 of the US Code.”<sup>47</sup> Javits’s rider was defeated but more narrowly, by 40-44. Some Republicans who had voted for the rider also voted for Javits’s amendment, including Bob Dole of Kansas, Jack Miller of Iowa, James Pearson of Iowa and Ted Stevens of Alaska.<sup>48</sup>

After these losses the Nixon forces were immediately galvanised into action. There is much evidence that Nixon became personally involved in the

considerable effort dedicated to saving the Philadelphia Plan. Immediately after the Senate vote, he drew up plans to galvanise the civil rights movement in support of the Philadelphia Plan in an extra-Congressional campaign.<sup>49</sup> He also issued powerful statements opposing the rider. Unlike some of his allies in the Senate, Nixon made the Philadelphia Plan the focus of his defence and made no attempt to bargain with the conservatives, as he had earlier the same year over school desegregation. He opened his first statement to congress on the subject with the contention that “the House of Representatives now faces an historic and critical civil rights vote.”<sup>50</sup> In the second of Nixon’s statements to Congress, read out by Jerry Ford in the House, he defended the idea of the Philadelphia Plan in the name of taxpayers, white and black.

By December 22, when the House debated the bill in its entirety, the rhetorical temperature had been raised considerably. Pro-rider forces attempted to steer the discussion away from the Philadelphia Plan. Veteran Democratic Representative George H. Mahon of Texas, who sponsored the bill, attempted to set the tone of the debate. “Mr. Speaker, the Philadelphia Plan is by no means and to no extent the actual issue involved here. The issue involved is the integrity of the House of Representatives... This is not a civil rights issue at all... It is not a Philadelphia Plan issue at all... It is simply, as I stated, a question of the power, the authority, the position and the prestige of Congress.” Congressman Roman Pucinski of Illinois went one better: “This is the most brazen power grabs you have ever been confronted with,” he told congressmen.<sup>51</sup> Many Democrats feared the repercussions of the Philadelphia Plan within labor groups and organisations that had provided support for them. Democratic Representative from Michigan, Jamie O’Hara, a labor supporter, wished back the past: “I would like to see a

colorblind America in which the color of a man's skin makes no difference." Democratic Representative Chet Holifield from California reminded the House of his civil rights credentials: "I voted for every one of the civil rights bills because I believe in civil rights and I believe in the rights of labor and I have voted to protect labor." Rep. James G. Fulton, a Republican from Pennsylvania, complained of the situation. "Mr. Speaker, this is a question of where two of our US progressive policies contravene each other. One is civil rights and the other is the right of free and collective bargaining."<sup>52</sup>

The pro-rider forces began using wider arguments. Pucinski fumed that the cost of construction would increase dramatically because contractors would be forced to hire untrained black labor as well as the trained white labor to complete the job. He also sharply observed that "if you think it will stop in Philadelphia or the building industry, you are mistaken." The anti-rider forces, taking the lead from the President, argued specifically in favour of the Philadelphia Plan from a civil rights perspective. Freshman Republican David Dennis from Nebraska felt that color shouldn't matter but unfortunately did. "(I)n theory, you should not have to legislate (sic) anything along these lines... But, as a matter of fact, as we all know, sometimes it does (matter)."<sup>53</sup> House Minority leader Gerald Ford argued against those who wished to reassert the rights contained within the 1964 Civil Rights Act. "All those social rights are important, but if you do not have a job, it does not do you much good."<sup>54</sup>

Some of the more radical supporters of civil rights attacked the Philadelphia Plan itself, complaining that it was one of the more conservative measures that might be taken to strengthen civil rights. However, they also opposed the rider, which might have prevented *any* civil rights plan that used financial leverage to pressure

public and private institutions into redressing civil rights concerns. Augustus Hawkins, black Democratic Representative from California, opposing the rider, complained that the Nixon administration, rather than voting for Hawkins' bill to strengthen the powers of EEOC, "prefers to confuse the issue with a new and different approach unsupported by a single civil rights authority or organization." He continued, saying that "it must be understood that this plan is only one, and not necessarily the best of tools for opening opportunities."<sup>55</sup> Bob Eckhardt of Texas expressed the frustrations of Democrats supporting a Republican initiative. "I grasp this small forceps even though it has been in the hands of the other party and there have been much larger tools and more effective ones that they have eschewed."<sup>56</sup> Democratic Congressman James C. Corman of California perhaps expressed a reason for Nixon's victory when he stated that "the fundamental issues are the same, it seems to me, and the words are almost the same as on every other civil rights matter."<sup>57</sup>

At the end of the debate, those opposing the rider had 208 votes, those in favour 156. Republicans supported Nixon 124 to 41.<sup>58</sup> Though the bill was returned to the Senate the same day, the pro-rider forces had been soundly defeated. In the Senate, the pro-rider forces went through the motions. It was difficult for those like Ervin who had opposed the 1964 Civil Rights Act to now insist that the Philadelphia Plan was a betrayal of the letter and the spirit of the law. Those opposing the rider insisted that the Plan was a pragmatic measure needed only for the construction industry, denying that the Plan was especially significant in changing policy and stressing its specificity. Republican Senator Charles Percy argued that "This plan is not coercive... It is merely a device for bringing all sides together to work out geographical areas for training and employment in the

construction fields.” Republican Hugh Scott cited Grover Cleveland in order to argue pragmatism against the bombastic charges of opponents of the Plan: “It is a condition, not a theory, that confronts us.” A roll-call vote to drop the rider succeeded<sup>59</sup>

#### Order No. 4

Clearly, Shultz and the rest of the administration originally expected little opposition to the Philadelphia Plan and saw the potential to make a distinctive contribution to civil rights. In a Department of Labor press release, released on September 23 1969, Shultz confidently announced that “...we expect the Plan developed for use in Philadelphia to provide useful general guidelines.” “The Nixon Administration now has a civil rights vehicle” announced Fletcher.<sup>60</sup> A draft of Order No. 4 signed by John Wilks on November 4 1969, extended the Philadelphia Plan’s model of proportional representation by race and selected ethnicity in employment to virtually all federal contractors. An outgrowth of Section 60-1.40 of OFCC regulations, Order No. 4 stated that affirmative action programs had to be separately created for each of the contractor’s establishments. Every contractor with more than 50 employees and holding federal contracts worth at least \$50,000 (the Philadelphia Plan had a cut-off of \$500,000) was required to set “significant, measurable and attainable” hiring goals and objectives. It stated that “The rate of minority applicants recruited should approximate or equal the ratio of minorities to the applicant population in each location.”<sup>61</sup>

The enforcement process detailed in the Order showed what that the Administration was determined to use sanctions only as a last option and that it expected

compliance to be fairly automatic. First, there was “conference, conciliation, mediation and persuasion.” Next, if that failed, employers would be issued a “show cause” order, asking them to show why action leading to debarment and contract termination should not be taken. Third, the employer would be issued with a notice of intent. Last, if all else failed, came contract termination and debarment from any more government contracts until “the contractor has established... personnel and employment policies in compliance with the provisions of” the Executive Order. Much of this process had been in place for over a decade. According to legal expert Peter G. Nash, the OFCC simply seized upon an old compliance procedure included in the procurement procedure that had been included in the procurement regulations at the request of the Vice President in 1956 whereby contracting officers are obliged to evaluate a prospective contractor’s ability to comply with the equal opportunity clause. It had never been used because “there existed no standards against which to make such a determination.” Order No. 4 remedied this problem. However, it is important to keep in mind that, as with the Philadelphia Plan, an employer needed only to show that a “good faith effort” had been made to achieve the goals that had been agreed.<sup>62</sup>

Sam Ervin, having got hold of a copy of the Order, charged in January the next year that the Labor Department had lied in the hearings. The Labor Department responded by stating that “through an administration error, a draft was circulated prematurely, not secretly as an order.” Despite the plausibility of Ervin’s case (and the publication of his charges in the *New York Times*), few seemed to care whether it had been published in the *Federal Register* or not. The cavalier treatment of Ervin’s reasonably legitimate complaint gives some indication that Nixon, at least in 1969-70,

was far more concerned about criticism from the civil rights movement and civil rights liberals than he was about carping from those on the right.<sup>63</sup> Shultz was able to issue a reworked Order No. 4 on February 3 1970. Published in the *Federal Register*, the new Order required contractors to file an affirmative action program within 120 days of signing a contract. Employers' plans would identify the "underutilization" of blacks, Spanish-surnamed Americans, American Indians, and Orientals. Such underutilization would be determined from, amongst other things, the "minimum population of the labor area surrounding the facility" (seemingly, a climb-down from the earlier version) and the "percentage of the minority work force as compared to the total work force." The contractor must indicate "specific goals and timetables" based on these criteria. The Order included the Philadelphia Plan's insistence that contractors must only show that a "good faith effort" was made to achieve the goals.<sup>64</sup>

It is possible that this move was less an attempt to generalise the stipulations of the Philadelphia Plan than a defence against the charge of inconsistency from builders who were taking Shultz to court. Certainly, the *Wall Street Journal* cited a "knowledgeable source" who explained that this was the real reason behind the Order. Whatever the case, no action was taken to ensure compliance with these stipulations outside of the construction industry until years after its implementation.<sup>65</sup> However, no one was under any illusions as to what the Philadelphia Plan's "affirmative action" really meant. Both the Philadelphia Plan and Order No.4, whenever they were discussed, were assumed to mean quotas. The distinction that had been made in defence of the Plan against Staats between quotas and "goals and targets" was ignored by most pundits. The *New York Times* reported blandly that "Allen [Dr. James E., United States Commissioner

of Education] Bids School Aides Around Country Back Job Quotas for Minorities.” Similarly, Jones, defending affirmative action programs in 1970, simply referred to “employment quotas.” The term “quotas” was the common descriptor of affirmative action programs taken on by the government used by all except those in the administration. Outside of congressional circles, the term excited no real controversy whatever until late 1971.<sup>66</sup>

### The Hometown Plans

On January 25 1970, the *New York Times* reported that a “hometown solution” had been created. Chicago had been, in late 1969, subject to black picketing of construction sites and thus had need of some sort of a solution. Interested parties, including the main contractors, city and state officials, and local civil rights had drafted a plan in response. The result, agreed by Shultz and Mayor Richard Daley, promised to provide 4000 new jobs a year for five years for minorities in private and public construction. Daley hailed it as “an example to the entire nation.”<sup>67</sup> On February 9, Shultz designated 19 cities as targets for adoption of more hometown solutions, warning that they would have Philadelphia-type plans imposed upon them if they failed to come up with an acceptable hometown solution. On March 18 the *New York Times* reported hopefully that hometown plans had been implemented in Chicago, Pittsburgh and Boston. “The more success such attempts achieve, the less need there will be for Philadelphia Plans and other forms of government compulsion.”<sup>68</sup>



The hometown plans or hometown solutions, as they were sometimes called, differed in several ways from compulsory plans. Targets and goals were agreed by local parties before gaining the federal government's seal of approval and thus varied greatly from city to city. They normally covered not simply federal contractors but all construction work in the city or area. Being voluntary, of course, there were no sanctions imposed against those contractors not honouring the agreement. However, with the Philadelphia Plan in the background, the implication was that a federally-enforced plan would replace any hometown plan that failed to achieve results.

On March 22 1970, the New York Plan, "the city building industry's answer to the Philadelphia Plan," was launched. The emphasis within many of these early plans was on training and the New York Plan was no exception. AFL-CIO construction union representative (and later Nixon cabinet member) Peter J. Brennan said it was a "comprehensive work-learn program with ... reasonable assurance of entry into the industry as a qualified craftsman." The plan had a goal of 800 minority members training in the first year. Brennan was prescient to note, however, that the difficulty might be that a minority group member might get on-the-job training for a construction project but would be unemployed again after three to four months.<sup>69</sup>

## Court Activism?

Nixon clearly led efforts to adopt these early affirmative action programs. He manoeuvred the Philadelphia Plan past obstacles erected by Staats and conservative politicians. But the administration did receive assistance from the courts. In *United States*

*v. Ironworkers, Local 86* (1970), the court ensured that the intake of black applicants for apprenticeships in the Seattle area never fell below 30 percent.<sup>70</sup> Both the Cleveland and Philadelphia Plans were upheld in state and federal courts. In Ohio in the summer of 1968 a building contractor failed to secure a contract for a Cuyahoga Community College project because his bid did not include a satisfactory manning table. He had submitted a manning table submitting that the numbers of minorities he would employ would be subject to the availability of minority workers in local unions. The contractor failed to persuade the Ohio Court of Common Pleas that competitive bidding procedures had been breached or that the goals and timetables constituted preferential quotas. The Supreme Court declined to review it after the decision was upheld by the Ohio Supreme Court a year later.<sup>71</sup>

Contractors bound by the Philadelphia Plan sued the Labor Department in 1969. In the spring of 1970 a federal district judge rejected their claims and supported the Ohio courts in favour of the plan. However, it is important to note that *the courts did not defend the Philadelphia Plan as a definitive model of race relations* but as an action taken to ameliorate tensions within the inner cities. The model of affirmative action to which they related was closer to that of Kennedy and Johnson. When the court instructed Sheet Metal Workers Unions to take a percentage of minority applicants for apprenticeships, it felt compelled to say that “we impose no quotas, we grant no preferences.”<sup>72</sup> Judge Charles R. Weiner held that the Philadelphia Plan “does not require the contractors to hire a definite percentage of a minority group” and emphasised the call for a good faith effort defensible in court. He noted that the union policy of racial exclusion was “repugnant, unworthy and contrary to present national policy. The

Philadelphia Plan will provide an unpolluted breath of fresh air to ventilate this unpalatable situation.”<sup>73</sup>

A year later, the Third Circuit Court of Appeals denied the contractor’s claims. The court was careful to note that the OFCC did not impose a social policy on the states wholesale. “Rather, they acted in one area in which discrimination in employment was most likely to effect the cost and the progress of projects in which the federal government had both financial and completion interests.” As Moreno notes, the court’s defence against the charge that the Philadelphia Plan violated Congressional intent centred on the fact of the construction industry’s specificity. No new general model of affirmative action emerged with the Philadelphia Plan. It is instructive that the court made these arguments in 1971, long after order No. 4 was in effect.<sup>74</sup>

## A Political Motive?

Historians have pointed out the political motives Nixon had for backing the Philadelphia Plan. Presidential aide John D. Ehrlichman remembered that Nixon thought Shultz had shown “great style” in devising a plan that divide two stalwarts of the Democratic Party, blacks and labor. On this issue, as Ehrlichman observed, the AFL-CIO and the NAACP would be locked in combat leaving the Nixon administration in the “sweet and reasonable middle.”<sup>75</sup> But the Philadelphia Plan also split the Southern Strategy’s core coalition of Republicans and conservative Democrats. Though it undoubtedly set core Democratic constituencies against each other, the Republican Party also looked in disarray after the vote. Little political good could have been accrued for Nixon by the Philadelphia Plan. As Nixon ruefully commented shortly after the administration’s victory in Congress, “(w)hile our ‘Libs’ won’t agree this hurts us with our constituency - we gained little on the play.”<sup>76</sup>

There were other compelling reasons why Nixon chose to implement this plan (detailed elsewhere in this dissertation). The racial violence that flared up in cities like Philadelphia, though nowhere near the level seen in previous summers, took place near construction sites.<sup>77</sup> Mayor Joseph Barr of Philadelphia sent an urgent telegram to Shultz in September 1969, pleading with him to intervene: “Negotiations between the Black Construction Coalition and the Contractors and Building Trade Unions have been exhausted in an attempt to settle the differences. Therefore your immediate presence is necessary to determine what steps must be taken to resolve an explosive situation. An anxious city awaits your immediate reply... We solicit your help in this hour of crisis.”<sup>78</sup>

The Kerner Commission had recommended in 1967 stronger enforcement of Executive Order 11246 (see appendix 1) and for revisions to it “particularly as regards labor unions.”<sup>79</sup> If Nixon had ample reason for attacking the civil rights records of labor unions, he was certainly not the only one to do so.

The overwhelming consideration of the administration during 1969 – a year before the next congressional election and more than two years before another election – was to alleviate tensions and blunt opposition to authority. If there were political motives for pushing the Plan, they were a defence against attacks from liberals within the Democratic Party, what John Skrentny identifies as “the politics of pre-emption.”<sup>80</sup> The material in the Nixon archives as well as in the Haldeman diaries confirms that the greatest sensitivity of the early Nixon period was towards attacks from the left, not the right. It was necessary, therefore, to pre-empt liberal attacks with liberal moves by the administration. John Finney of the *New York Times*, in a piece published in February 1970, used the word pre-emption when characterising the first year of the administration. It had, he said, shrewdly succeeded in “taking away or neutralizing every issue that might be exploited by the Democrats.”<sup>81</sup>

An objection might be that the “Southern Strategy” constituted extreme sensitivity towards racial conservatives. This is undoubtedly true in terms of how programs were publicly presented. But Mitchell’s “watch what we do” maxim applied to the administration’s dealings with the South.<sup>82</sup> In terms of the content of programs or of how effective they were, Nixon feared the attacks from the left more than those from the right in 1969. And, as speechwriter William Safire once said of Mitchell, Nixon “saw the need to lean right when you were moving left, taking as many conservative friends with

you as possible when you had to go in a progressive position.”<sup>83</sup> Before 1970 Nixon had no “New Right” strategy based on opposition to liberal measures of the Great Society. He had no real solid constituency and, while he had managed to gain the support of Southern conservatives, it was by no means a lasting allegiance. He constantly experimented with different strategies to gain the allegiance of the “silent majority” of Americans, a task rendered difficult by its very silence. Polls indicated that the majority of Americans were still fairly liberal when it came to civil rights.<sup>84</sup> Nixon constantly scrambled for the middle ground on most issues. The Philadelphia Plan, at least in 1969, appeared to be within that middle ground.

Whatever Nixon’s motives, during the period of 1969-70, few within or outside the Nixon administration found anything compelling about the issue of preferential treatment in employment.<sup>85</sup> The contentious issue of 1969-70, reflecting the fact that hopes were still invested in education as a tool for the creation of black equality, was school desegregation. After passage of the 1964 Act, HEW demanded that districts take affirmative steps to end racial discrimination within one year of the Act’s effective date. When this deadline was not achieved, a new deadline was set for 1967. When this in turn was not met, the deadline was moved to the 1968 school year, or at the latest 1969. This, too, was later modified, administratively, to provide a 1970 deadline for districts with a majority Negro population, or for those in which new construction necessary for desegregation was scheduled for early completion. Meanwhile, The Supreme Court had ruled busing to achieve racial balance permissible as a remedy in *Green vs. New Kent County, VA* in May 1968.<sup>86</sup> Leon Panetta, then a liberal Republican committed to civil rights reform, wrote a bitter account of his efforts within and eventual forced resignation

from the Nixon administration. *Bring Us Together*, published months after Panetta's resignation was announced on Feb. 17, 1970, detailed the failings of the Nixon administration in the area of school desegregation. Not once did it mention affirmative action.<sup>87</sup>

A response from the Nixon administration to criticism from the Congressional Black Caucus in early 1971 indicates the weight placed on civil rights issues of the day:

The focus of this Administration has not been on dramatic confrontation, but on quiet achievement.

- Since 1968, funding for civil rights enforcement activity has been doubled.
- In the current school year alone, the number of minority children in the eleven southern states attending desegregated school systems has been tripled from the pervious [sic] year.
- Small Business Administration lending to minority enterprises has been increased seven-fold since 1968, from \$28 million to \$217 million...
- Food assistance programs have been greatly expanded...<sup>88</sup>

Again, the Philadelphia Plan was not mentioned. Looking at discussion of the Philadelphia Plan in 1970 and 1971 within the administration, it becomes evident that it was seen as evidence of the administration's concern for civil rights rather than the blunt instrument against them affirmative action would later become. Occasionally, either Nixon or one of his aides would complain that no one had heard of the Philadelphia Plan. In March 1970 Nixon scrawled in the margins of a memo concerning efforts to publicise civil rights efforts of the administration: "E - Maybe what we need is a 'white' paper on the Civil Rights actions of the Administration - Have it put out by our top Black Appointees. I believe the record is impressive on things done (Phil plan etc.) + things [?] (Family Assistance)." Leonard Garment also suggested later in the year a plan to publicise the administration's civil rights efforts with the "Philadelphia Plan Revisited."

He mentions “home town solutions”, a “major Department of Labor effort” now functioning in 102 cities.<sup>89</sup>

The fact that the administration was simultaneously trying to keep quiet about school desegregation efforts and promoting its affirmative action efforts gives some indication of the obscurity of the Philadelphia Plan. So does the lack of mention in the *New York Times* of the Philadelphia Plan, affirmative action or “quotas.” In 1970 the Philadelphia Plan received mention in the paper (mostly in relation to the hometown plan in New York) each month up until October. In 1971, the plan received mention only five times. In 1970 or 1971 the terms “affirmative action” or “quotas” did not attract enough attention to merit an index category.<sup>90</sup>

Proving how different the context in which the issue was raised in 1972, the *New York Times* reported in September 1971 that the Democrats were willing to outlaw preferential hiring altogether in exchange for cease-and-desist powers for EEOC. To win the support of Democratic Representative Edith Green of Oregon, who, according to the *New York Times*, maintained a substantial following among conservative Democrats, Democratic leaders agreed to sponsor three crucial amendments.<sup>91</sup> One of them would have prevented EEOC from imposing hiring quotas or requiring preferences. Made by Democratic Congressman John H. Dent of Pennsylvania, it stated that “All authority, functions, and responsibilities vested in the Secretary of Labor pursuant to Executive Order 11246... are transferred to the Equal Employment Opportunities Commission. The Commission shall be prohibited from imposing or requiring a quota or preferential treatment with respect to numbers of employees or percentages of employees of any race, color, religion or national origin.”<sup>92</sup> Dent made it clear that this meant goals,



too. “If I did nothing else in this law but wipe out the contract compliance feature and put it under the jurisdiction of EEOC ...then I would have done sufficiently (sic)”<sup>93</sup> As the *New York Times* noted, this “would rule out the so-called Philadelphia Plan...”<sup>94</sup>

In an interesting debate indicating the ideological confusion at that time over the issue of affirmative action, Republicans argued for the legality of quotas and Democrats united against affirmative action. Gerald Ford told the House that the Dent bill – known as HR1746 – would make it harder for a black man to get a job and urged the house to pass instead HR9247, the substitute bill sponsored by the Nixon administration known as the Erlenborn substitute.<sup>95</sup> Augustus Hawkins, co-sponsor of the bill, had accepted Dent’s amendment as one of three to his bill, HR1746. He attacked the Philadelphia Plan as he had in the debate over it in 1969: “In the first year of the operation do you know how many blacks got jobs? Less than 100. Do you know how many women have gotten jobs in the history of the Philadelphia Plan? Not one.”<sup>96</sup> Edith Green, who had been a civil rights activists during the 1950s and early 1960s, also attacked quotas. Left-leaning black representative Shirley Chisolm tried to calm the waters, justifying her support for HR1746 by saying that the power to issue cease and desist order will allow EEOC to “make construction workers and other groups do that which they have to do in order to be able to prevent preferential treatment.”<sup>97</sup> Radical Democrat from New York Bella Abzug was the only Democrat supporter of HR1746 to say that she was opposed to Dent’s amendment, though “...I can accept the amendments to get an overall bill which gives enforcement powers to the EEOC.”<sup>98</sup>

Some who might have voted against HR1746 without the amendment were swayed by the efforts of the Democrats. Republican Richard G. Shoup of Montana

attacked HR1746 as it would result in “forcing employers to practice illegal discrimination because of race.”<sup>99</sup> Democrat John R. Rarick of Louisiana swung his weight behind the Dent amendment, pointing out the many tentacles of affirmative action, including the Small Business Administration’s 8(a) program (discussed later): “What has occurred and destroyed the State public school systems of this great Nation now threaten the laboring system that has built America.”<sup>100</sup> Most conservatives, however, were not swayed by Dent’s amendment and worried more about what an empowered EEOC might do than about affirmative action programs. Thirty-three year-old Republican Senator William Steiger of Wisconsin summed up the feeling of most of the House when he objected to the “smokescreen of setting quotas” and the “smokescreen of preferential treatment.” The real issue, he explained, was “what kind of enforcement powers should be granted to the EEOC.”<sup>101</sup> HR1746 lost the day.

When the Erlenborn substitute came before the Senate, Sam Ervin, the primary force against the Philadelphia Plan in 1969, failed to raise any points about “quotas.” Instead, he accepted its existence and did not argue for its annulment. He did not question the substance of the Philadelphia Plan but had an amendment passed that prohibited the OFCC from finding an agreed affirmative action plan inadequate in Nixon’s version of the EEOC bill (which did not give cease-and-desist powers to EEOC). As Schuwerk noted, “(t)here were proponents of strong civil rights legislation on both sides of the question [about whether to give EEOC cease and desist powers] and very little attention was directed to the propriety of the substantive remedies available under the OFCC program.”<sup>102</sup> Nixon emerged with another victory and his bill was made law in 1972 with affirmative action intact.

## The Failures of the Philadelphia Plan and the Hometown Solutions

Besides being fairly obscure at the time, the Philadelphia Plan and the “hometown solutions” could be not counted as successes in their own terms. First, and almost immediately after Nixon struggled to defend the plan in Congress, the initiative failed to offset the criticism Nixon attracted from the civil rights movement and other groups concerned with civil rights. He had not managed to set the civil rights agenda with the initiative and criticisms over other aspects of his administration’s civil rights policy overshadowed any credit for the Philadelphia Plan. The Philadelphia Plan did not succeed in its preempting the liberal agenda.

Jill Quadagno indicates that, for the intended beneficiaries of the Plans, they had been successes: “Yet the Philadelphia Plan worked. Through the early 1970s the Philadelphia Plan was implemented in cities throughout the country. Minority representation in the skilled craft unions increased significantly during this period.” She also states that: “Hiring practices among federal contractors also experienced an enormous shift. In 1966 the workforce of federal contractors was disproportionately white; by 1974 their workforce had become disproportionately black.”<sup>103</sup> All the evidence, however, seems to contradict Quadagno’s assertion. Neither the Philadelphia Plan nor the hometown plans worked. The Chicago Plan that Mayor Daley had hailed as “an example to the entire nation,” the first of the hometown plans, failed to live up to Daley’s (or, more to the point, black Chicagoans’) expectations. Within eight months, the Civil Rights Commission complained that there were only 75 minority members in any of

the training programs set out in the Chicago Plan, the *Washington Post* spoke of the “disarray” of the Chicago Plan and Herbert Hill, one of its architects, flatly called it a “failure.”<sup>104</sup> Some months later it collapsed amid a financial scandal in which the Plan’s director, Alderman Fred Hubbard, disappeared and was later accused of embezzling more than \$100,000 in federal funds designated for the program.<sup>105</sup>

Any improvement in relations between white construction workers and black civil rights groups lobbying for minority construction jobs was not obvious in Seattle. On June 7 1972 it was reported that construction workers armed with crowbars battled pipe-swinging blacks at a building project on the Seattle Community College. Two white workers were hospitalised and five blacks, including Republican Representative Michael Ross, were arrested.<sup>106</sup> Usually, the failures of hometown plans to make any impact on black unemployment were less dramatic. More typical, perhaps, was the situation in New Rochelle, New York. A campaign mounted in the winter of 1966-67 demanded a black share of construction jobs in the building of a mall in a black neighborhood. Nearly five years later, and a year after the adoption of a hometown plan, three black apprentices – a plumber and two electricians – finished their three-year apprenticeships and were becoming journeymen. Ninety-six out of hundreds of white candidates for apprenticeship programs were minority members. As Napoleon Holmes, listed in the *New York Times* as New Rochelle’s “most influential and effectual black leader,” stated of the demonstrations he had led five years previously: “We accomplished tokenism.”<sup>107</sup>

Some problems were common to all of the hometown plans. Relations between the various groups effected by the plans, while only occasionally as rancorous as

those between blacks and white construction workers in Seattle, were difficult. For example, in Chicago in 1972 a new plan launched in July of 1972, which promised to hire more than 10,000 minorities for construction jobs by 1975, had to be scuttled when one of the local black groups, the Coalition for United Community Action, and a Spanish-speaking group, the Spanish Coalition for Jobs, protested that their position within the plan was not equal to that of the Urban League. Two months later, the plan was resuscitated but, after nine months of the plan being in operation, the Urban League pulled out, complaining about the refusal of unions and contractors to uphold the targets set for them. Finally, in January of 1974, an imposed plan was installed.<sup>108</sup> Such problems were not restricted to Chicago. Leonard Garment, charged with replying to the Black Caucus Report criticising the Philadelphia Plan and the Hometown solutions, accepted publicly in May 1971 that these sort of problems hampered the hometown solutions:

Admittedly, there are problems attendant with this approach. It is difficult and tedious to obtain agreement between these oft-conflicting parties ['construction contractors, building trade unions, and the minority community']... Because of the great advantages [local initiative, voluntary nature] to the approach, the Department [Labor] has an obligation to make them work.

In the same month, Shultz had to admit at a press conference that "Some of the hometown solutions have not worked as well as we had hoped; some have." He failed to specify exactly which ones had worked well. Shultz ordered a report from staff after difficulties in enforcement ensued. Mark Alger from the General Government Program Division told his boss: "We are analyzing the efficacy of our policy on hometown solutions due to problems we encountered in developing and implementing them."<sup>109</sup> The Nixon Administration clearly favoured voluntary plans over imposed ones.

In public, officials stressed the importance of the local plans and the desirability of a co-operative spirit within the construction industry. Privately, they preferred the distance between themselves and the hometown plans. The real attraction for the administration, implying a certain cynicism about the chances of success for voluntary plans, was, as Larry Silberman put it, “the inability to trace failure of hometown agreements to the Federal Government...”<sup>110</sup>

Besides the imposition of Philadelphia Plan-style plans in five cities, the number of original 102 cities with “functioning” hometown plans had dwindled to 45 in April 1972. Throughout the early months of 1972 Assistant Secretary of Labor Richard J. Grunewald travelled the country re-launching hometown plans. By July there were 50 federally approved plans with cities such as Peoria, Illinois promising to reserve 158 construction jobs for minorities over the next five years.<sup>111</sup> In 1973 OFCC conducted what it termed a comprehensive audit of the voluntary plans then in practice. It found that in terms of “placement credits” (OFCC’s term for the successful placement of minority workers in construction jobs,) 3,243 had been achieved against total goals and targets of 6,573. Four out of forty plans attained or exceeded their targets but, in two of those, individual participating trades had failed. As the Civil Rights Commission observed, many of the 3,243 “worked only thirty days or slightly longer.” Nor did all of the 3,243 have union memberships – many simply had permits to work from the union office. The Civil Rights Commission concluded its assessment of the audit reports by saying that “(t)he audit results almost certainly exaggerate the achievements, if any, of the plans.”<sup>112</sup>

## Imposed Plans

The Congressional Black Caucus, the United States Civil Rights Commission, Arthur Fletcher and other civil rights interests felt that the hometown plans were inadequate because they did not impose sanctions on transgressors (though Fletcher did not say so until after he left the administration in early 1972). They felt that all the plans should be made involuntary.<sup>113</sup> But the imposed plans fared little better than the voluntary ones. Again, problems ensued that had bedevilled the hometown plans. The first was that, because of the way the construction industry worked, results would not pour in quickly if they poured in at all. The building trades operated a tightly controlled apprenticeship program (itself created by New Deal legislation) whereby apprentices took three to five years to learn a trade before they could become qualified. Apprentices might drop out before their apprenticeships were complete and there was no absolute guarantee that the apprentices would become qualified journeymen. An indication of this problem can be seen in Chicago where 75 minority members were accepted on training programs. Of the 46 that were placed in on-the-job training, only five were employed in 1974.<sup>114</sup> Another was identified by the US Commission on Civil Rights after reviewing available data more than two years after the implementation of the Philadelphia Plan. It said:

Of the five existing imposed plans [Philadelphia, Washington, San Francisco, Atlanta, and St. Louis. New York and Seattle, unsurprisingly, were later added to the list] those in Philadelphia and Washington DC are the oldest and the only ones for which employment data are available. In neither case have the results been encouraging. ...The massive enforcement activity required indicates that a new approach is called for since the *Federal Government does not have the resources to cope with such noncompliance if encountered nationwide.*<sup>115</sup>

The idea behind selective enforcement was that an example would be set for all contractors; most, it hoped, would effectively police themselves when it was

known that the government would take action. OFCC worked with tiny percentages of the total workforce when it dealt with imposed plans for a reason; it simply did not have the staff even to monitor, let alone enforce, compliance. Hence, monitoring was patchy at best. There were only two ways, given limited resources, of measuring success or lack of it. First, contractors could report how many minority “man-hours” had been worked as opposed to all hours worked. There were several problems inherent to this method of monitoring. It relied on the honesty of the contractors in reporting accurately. Because of the specifications on the forms used, the term minority was not broken down into its constituent parts.<sup>116</sup> It was favoured by Department of Labor press releases probably because results could be made to look favourable even if they were insignificant. For instance, one press release in December 1973 reported that in Philadelphia, out of 3,818 hours worked by plumbers and pipefitters during a ten-month period, 852 of them had been by minorities. This made up 22 percent, within the range of targets and goals of 20 – 24 percent set by the Philadelphia Plan. However, when taking into account the estimated average for the construction industry at that time of 39.1 hours per week, the total minority employment was equivalent to *one* unspecified “minority” person working half of the ten-month period.<sup>117</sup>

The second method of monitoring employed by OFCC was a count, made onsite on a specific day. Difficulties also existed here. First, the visit was arranged. Some contractors, it was reported, employed a method of avoiding an accurate count by “motorcycling” – sending a minority worker from site to site – or by “checkerboarding” – sending all minority employees to federally financed projects (the only inspected by



OFCC officials). Richard Rowan and Lester Rubin, who conducted a study of the effectiveness of the involuntary Washington DC plan, observed:

Minorities are not being left on the bench when contractors need them for compliance purposes. Despite unemployment in some unions, minorities in the unions are rarely unemployed.... We offer the possibility that relatively few minorities are being used to meet man-hour goals and that permit-holders – not new union members – are being used to meet the requirements.<sup>118</sup>

Not surprising, given the OFCC's inadequate monitoring efforts, few sanctions were imposed, despite ensuing problems in the imposed plans. By September 1970 it had been reported that "violation of the Philadelphia Plan is very wide-spread."<sup>119</sup> But OFCC's movement towards effective sanctions proved tortuous. Debarment actions were initiated against seven companies. Seven notices of intent to impose sanctions were sent in 1970. Yet, by September 1971 an OFCC memorandum entitled "Need for Compliance Enforcement in the Construction Industry" revealed that "these sanctions [cancellation of contracts and debarment] have never been used in the construction industry."<sup>120</sup> By July 1975 only six construction contractors had been debarred or had agreed to consent decrees. All six were speciality contractors and none was large. Five were in Philadelphia and one was in Denver. Even these sanctions were mild; all but one of the debarment orders had been lifted by August 1974. Not that the situation in Philadelphia had changed – it was still included on the list of imposed plans in March 1975.<sup>121</sup> As the *Chicago Tribune*, perhaps indulging in a bit of *schadenfreude* after the debacle of Chicago's hometown plan, remarked in 1972, the Philadelphia Plan "nominally had sanctions that in the event proved unenforceable."<sup>122</sup>

The genius of the plans had been to create pressure without having to enforce any sort of sanctions. Any real successes of the Philadelphia Plan must be seen in

light of the large number of contractors in other industries and recipients of government assistance (such as colleges and universities) that imposed upon their own structures affirmative action plans after seeing the government's determination to implement them in the construction industry. Problems emerged, however, when contractors consistently failed to put in a "honest and good faith effort" to achieve the targets and goals set for them in areas with imposed plans. The federal government was remarkably loath to impose sanctions.

### Who Gained?

The intended beneficiaries of the programs in the construction industry failed to gain materially from either imposed or hometown plans more than ten years after the plans had been developed. (It might be argued, though, that black Americans gained symbolically by the appearance of minority labourers on construction sites.) Any advance in the interests of unemployed black youth came in the thousands when the problem was properly measured in the millions. Over a year in operation, the Philadelphia Plan gained 41 jobs for minorities on construction sites while the black unemployment rate remained at 12 percent. The hometown plans, numbering over a hundred and covering whole states in some instances<sup>123</sup> resulted in a little over 3,000 job placements by 1973 – hardly enough to cheer up the millions of unemployed African-Americans. In terms of participation in the referral units in building trade unions, there was little progress. Between 1970 and 1972 the number of black union members rose by

three percent. However, the total proportion of blacks within building trade unions did not change.<sup>124</sup>

Far more effective in the construction industry than affirmative action programs was the onset of recession and “stagflation.” In May 1971 the *New York Times* reported a “slowdown in housing construction and purchase.” The national unemployment rate grew to 4.8 percent – the highest in five years – and amongst inner-city blacks in Philadelphia the rate was over 12 percent. The open shop share of construction workers doubled from 20 percent in 1968 to 1975. Union membership – and a guarantee of decent wages – was also declining. In 1970 construction workers had been among the highest paid workers. By the end of the decade their weekly earnings declined by more than 12 percent. By 1974 unemployment among all construction workers had skyrocketed to 12.4 percent. Yet the Philadelphia Plan had assumed a vacancy rate of seven and a half percent per year!<sup>125</sup> Instead of blacks moving up to participate on an equal level with whites in a high-paying industry, the entire industry declined so much that the unemployment level within it matched that of inner-city blacks.<sup>126</sup>

However, there is no question that the programs, having been pushed successfully by the most senior officials in the Nixon administration when challenged in Congress, died of neglect. Beginning in 1970 Nixon began to direct civil rights efforts towards the black community outside of the ghettos. Instead of apparently fruitless efforts within the inner-cities, policy would concentrate on the black middle class. Black colleges received huge support. Black-owned business received support and contracts to an extent never envisaged when Nixon promised to promote black capitalism or even when he created the Office of Minority Business Enterprise in March 1969. Such

programs as Model Cities designed to help the ghetto were dropped (See Chapter 5). Nixon initiatives like the Philadelphia Plan and the hometown solutions – aimed at ghetto employment as they were – could not be dropped but could be left to languish after their enforcement proved complicated. Though other civil rights initiatives fared reasonably well, the Philadelphia Plan and the other hometown solutions effectively disappeared. In early 1974, Paul Delaney of the *New York Times* commented that “(m)inorities, especially blacks, had seen one of the Administration’s main efforts in civil rights – the various plans to put minorities in construction jobs – die for lack of enforcement.”<sup>127</sup>

It would be possible to argue that the most important gains had been made by minorities in other industries where, prodded by news of an imposed plan in Philadelphia, employers quickly volunteered their own affirmative action plans. The Philadelphia and hometown plans did set a pattern for later, more successfully implemented affirmative action programs. They provided a useful bridge between voluntary civil rights efforts employed in the 1960s and court-mandated minority hiring in the 1970s. Nixon felt that “while legal segregation is totally wrong, forced integration of housing or education is just as wrong.”<sup>128</sup> The hometown solutions were voluntary agreements entered into by local parties. But even the Philadelphia Plan and order No. 4, by using economic necessity rather than more awkward and expensive enforcement mechanisms, could be seen as voluntary in that contractors voluntarily bid for government contracts. Construction workers in effect volunteered to work next to blacks. Unions could maintain a lily-white complexion if they no longer wished to work on government contracts. This distance from direct coercion engendered in the Philadelphia Plan eased the Nixonian and Republican mind, fearful as it was of government

compulsion. Forced integration in the workplace, when wages were paid indirectly by the federal government, at least gave a veneer of choice.

In the end, other Nixon administration initiatives, detailed in the next chapter, contributed more to the institutionalisation of affirmative action than did the Philadelphia Plan. However, it successfully tested this particular method of civil rights enforcement in the courts and in Congress. Because of the particular nature of its target – construction projects that were generally very visible and often within the confines of the ghetto – courts backed the goals and targets for minority hiring called for by the Philadelphia Plan despite the express outlawing of quotas under Section 703(j) of the Civil Rights Act. Though the courts did so in a period when riots still threatened to erupt, crises in black employment clearly existed in many industries outside of construction and away from the seething cauldrons of the inner cities. Thus the government could extend “goals and targets” to other areas with little fear of legal reprisals. Of equal importance, the Revised Philadelphia Plan withstood the attacks of Congressional and political foes. Southerners and conservative Republicans lost the argument that the Philadelphia Plan and Order No. 4 amounted to illegal quotas.

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<sup>1</sup> Jill Quadagno, *The Color of Welfare: How Racism Undermined the War on Poverty* (New York: Oxford University Press, 1994), 80.

<sup>2</sup> Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960-1972* (Oxford University Press, 1990), 412. As Graham notes on the same page, the impact of Revised Order No. 4, issued in December 1971, was even greater: “By adding the female majority to the established racial and ethnic minorities, Revised Order No. 4 in effect defined almost three-quarters of the American population as “affected class” minorities whose distribution in the workplace should proportionately reflect their distribution in the population.”

<sup>3</sup> The black caucus, in a report issued on April 16 1971, labelled the Philadelphia Plan a “cruel delusion” to black construction workers. See Black Caucus Report and Reviews [6 of 6] [CFOA 463], Box 47, WHCF: SMOF: Garment, NPMP.

<sup>4</sup> Herbert Hill, “The Construction industry: Evading the Law,” *Civil Rights Digest* (Washington DC: Quarterly Publication of the United States Civil Rights Commission – US GPO), (April 1975). United

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States Civil Rights Commission, *Federal Civil Rights Enforcement* (Washington DC, US GPO, September 1970), 209.

<sup>5</sup> See Byron E. Shafer, *Quiet Revolution: The Struggle for the Democratic Party and the Shaping of Post-Reform Politics* (New York: Russell Sage Foundation, 1983).

<sup>6</sup> See C. Wright Mills, *The Power Elite*, (London: Oxford University Press, 1956).

<sup>7</sup> James E. Jones, Jr., "The Bugaboo of Employment Quotas," *Wisconsin Law Review* (1970), 341-403, 343.

<sup>8</sup> This definition was from Order No. 4, cited in United States Commission of Civil Rights, *The Federal Civil Rights Enforcement Effort: A Reassessment* (Washington DC: US GPO, January 1973), 40.

<sup>9</sup> Anonymous memo to Mr. Terrence M. Scanlon, Office of Minority Business dated 15 December 1969, Equal Employment Opportunities Commission (EEOC) – 1970 [2 of 2][CFOA 7730], Garment: Alpha Subject Files, Box 35, WHSF: SMOF: Garment, NPMP.

<sup>10</sup> The 1964 Civil Rights Act, Section 703(j), Title VII, expressly outlawed the imposition of employment quotas of minorities or anyone else. See citation in *Congressional Record* – 91<sup>st</sup> Congress, 1<sup>st</sup> Session – Senate 39951. See also Robert P. Schuwerk, "The Philadelphia Plan: A Study in the Dynamics of Executive Power," *University of Chicago Law Review*, Vol. 39, 1971-72, 723-760.

<sup>11</sup> Jones, "The Bugaboo of Employment Quotas," 343-345, Schuwerk, "The Philadelphia Plan," 739-740, Graham, *The Civil Rights Era*, 287-290.

<sup>12</sup> See Appendix II.

<sup>13</sup> Ralph Blumenthal, "Westchester Revisited: Recent issues a dim memory," *New York Times*, May 7 1971, 7.

<sup>14</sup> Johnson had attempted to downplay the differences between the AFL-CIO and the NAACP on the issue of union discrimination. At a civil rights conference in 1966 Don Slaيمان of the AFL-CIO and Herbert Hill of the NAACP argued for some time; their discussion occupied over 40 pages of the transcripts of the conference. See Kevin L. Yuill, "The 1966 White House Conference," *Historical Journal* Volume 41, No. 1 (May 1998), 259-282.

<sup>15</sup> Jones, "The Bugaboo of Employment Quotas," Peter G. Nash, "Affirmative Action Under Executive Order 11,246," *New York University Law Review*, Vol. 46, No. 2, April 1971, 225-261, Graham, *Civil Rights Era*, 287-288.

<sup>16</sup> Jones, "The Bugaboo of Employment Quotas," 343-344, Graham, *Civil Rights Era*, 288.

<sup>17</sup> See Chapter 7, "The Construction Industry Problem" in Alfred Blumrosen, *Black Employment and the Law* (New Brunswick, NJ: Rutgers University Press, 1971), 304-327.

<sup>18</sup> See Chapter 8, "The Newport News Agreement" in Blumrosen, *Black Employment and the Law*, 328-407.

<sup>19</sup> Peter G. Nash, "Affirmative Action Under Executive Order 11,246," *New York University Law Review*, Vol. 46, No. 2, (April 1971), 225-261, 231.

<sup>20</sup> United States Civil Rights Commission, *Federal Civil Rights Enforcement* (1970), 39-41, Jones, "The Bugaboo of Employment Quotas," 343-346, Graham, *Civil Rights Era*, 285, 286.

<sup>21</sup> Jones, "The Bugaboo of Employment Quotas," 346, Graham, *Civil Rights Era*, 278-287.

<sup>22</sup> Schuwerk, "The Philadelphia Plan," 742.

<sup>23</sup> United States Civil Rights Commission, *Federal Civil Rights Enforcement* (1970), 41. Jones, "The Bugaboo of Employment Quotas," 347-348, Graham, *Civil Rights Era* 278-287.

<sup>24</sup> Jones, "The Bugaboo of Employment Quotas," 346.

<sup>25</sup> United States Civil Rights Commission, *Federal Civil Rights Enforcement* (1970), 29, 40.

<sup>26</sup> Graham, *Civil Rights Era*, 290, 291.

<sup>27</sup> Nash, "Affirmative Action under Executive Order 11,246," 233, 234.

<sup>28</sup> Nash, "Affirmative Action under Executive Order 11,246," 234. Graham, *Civil Rights Era*, 294-295.

<sup>29</sup> United States Civil Rights Commission, *Federal Civil Rights Enforcement* (Washington DC: US GPO, 1969) 143. Graham, *Civil Rights Era*, 290.

<sup>30</sup> Graham, *Civil Rights Era*, 323.

<sup>31</sup> A few articles debating the legality or otherwise of the Philadelphia Plan measured against Title VII of Section 703(j) appeared in law journals shortly after the Philadelphia Plan was introduced. Robert D. Schuwerk, for instance, argued that, although 703(j) meant only that quotas are not required by the Act, "Congress did explicitly disapprove such executive action." Jones and Nash felt that Congress approved the

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Philadelphia Plan when, in December 1969 it debated a rider to an appropriations bill that would have made the Philadelphia Plan illegal (see below). Schuwerk, "The Philadelphia Plan," 734. Jones, "The Bugaboo of Employment Quotas," 366, Nash, "Affirmative Action," 228, 229. See also Graham, *The Civil Rights Era* 327-332.

<sup>32</sup> *Congressional Record (CR)*, 91<sup>st</sup> Congress, Vol. 115, 40039.

<sup>33</sup> Section 904 of HR15209 read: "In view of and in confirmation of the authority invested in the Comptroller General of the United States by the Budget and Accounting Act of 1921, as amended, no part of the funds appropriated or otherwise made available by this or any other Act shall be available to finance, either directly or through any Federal aid or grant, any contract or agreement which the Comptroller General of the United States holds to be in contravention of any Federal statute."

<sup>34</sup> A. James Reichley, *Conservatives in an Age of Change: The Nixon and Ford Administrations* (The Brookings Institution: Washington, D.C., 1981), 43-45.

<sup>35</sup> *Congressional Record (CR)*, 91<sup>st</sup> Congress, Vol. 115, 39974. Schuwerk, "The Philadelphia Plan," 739, 740. Graham has a detailed account of the debate in *The Civil Rights Era*, 334-340.

<sup>36</sup> Cited in *CR*, 91<sup>st</sup> Congress, Vol. 115, 39951.

<sup>37</sup> *CR*, Vol. 110, 88<sup>th</sup> Congress, 39965. See also Robert D. Loevy, *To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964* (London: University Press of America, 1990) and Charles and Barbara Whalen, *The Longest Debate: A legislative History of the 1964 Civil Rights Act* (Washington DC: Seven Locks Press, 1985).

<sup>38</sup> Bayard Rustin, "From Protest to Politics: The Future of the Civil Rights Movement," *Commentary*, (February 1965), No. 2, Vol. 39, 25-31.

<sup>39</sup> Garry Wills, *Nixon Agonistes: The Crisis of the Self Made Man* (Boston, MA: Houghton Mifflin Company, 1970), 34.

<sup>40</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 39948.

<sup>41</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 39950, 39949.

<sup>42</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 39966.

<sup>43</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 39957, 39959, 39122.

<sup>44</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115 39959, 39962. Hruska was to become briefly famous by his unique defense of G. Harrold Carswell, Nixon's second unsuccessful choice for Supreme Court Justice. Replying to the criticism that Carswell was "mediocre," Hruska retorted that mediocre Americans deserved representation in the Supreme Court, too.

<sup>45</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 39965.

<sup>46</sup> For a breakdown of votes in the Senate and the House on motions concerning the Philadelphia Plan, see Appendix IV.

<sup>47</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 39969.

<sup>48</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 39969.

<sup>49</sup> Cited in John Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (London: University of Chicago Press, 1996), 205.

<sup>50</sup> Cited by Gerald Ford in *CR*, 91<sup>st</sup> Congress, Vol. 115, 40906. See also Schuwerk, "The Philadelphia Plan," 749.

<sup>51</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 40903, 40904.

<sup>52</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 40907.

<sup>53</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 40916.

<sup>54</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 40907.

<sup>55</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 40917. Later in the debate, a cable from the Civil Rights Commission was inserted into the *CR* opposing the rider (as was one from Americans for Democratic Action). *CR*, 91<sup>st</sup> Congress, Vol. 115, 40921.

<sup>56</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 40920.

<sup>57</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 40918.

<sup>58</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 40921.

<sup>59</sup> *CR*, 91<sup>st</sup> Congress, Vol. 115, 40743.

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<sup>60</sup> Department of Labor press release, "Statement by Secretary Shultz on Philadelphia Plan Guidelines," Sept 23 1969; and "For Backgrounder on the Philadelphia Plan vote," no date, Philadelphia Plan [2 of 2][CFOA 1265], Box 143; WHCF: SMOF: Garment, NPMP.

<sup>61</sup> Nash, "Affirmative Action Under Executive Order 11,246," 250.

<sup>62</sup> Nash, "Affirmative Action Under Executive Order 11,246," 250, 253. The issue of the "good faith effort" was raised both by the government, as a defence against those charging that it imposed quotas, and by civil rights interests questioning the government's determination to implement the Philadelphia Plan. Len Garment, Nixon's civil rights representative, released a statement on the differences between quotas and affirmative action where he stated that "Affirmative action requires a good faith effort within the context of realistic and attainable results, permitting, therefore, the additional consideration of merit. The Philadelphia Plan is such an affirmative action plan and has the full support of the President." On Quotas and Affirmative Action Oct. 6 1972 [2] (speech given by Leonard Garment October 6 1972), Speeches and Meetings, Box 30, WHCF: SMOF: Garment, NPMP. On the other side, the Congressional Black Caucus complained that "(w)e are told by the authors of the highly-touted Philadelphia Plan that fixed percentage set-asides for minority non-construction contractors are 'neither necessary nor desirable.'" ("Report to the Nation, Presented by the Congressional Black Caucus," Monday, May 24 1971, 7, Black Caucus Spring '71 Report and Reviews I [1 of 3] [CFOA 10172], Box 48, WHCF: SMOF: Garment, NPMP.) Herbert Hill, the NAACP's spokesman on labor issues, also criticised the way the "good faith effort" had been used to avoid implementing sanctions. See Herbert Hill, "The Construction Industry: Evading the Law," 22-36.

<sup>63</sup> "Ervin Criticizes Orders On Hiring," *New York Times*, January 16 1970, 1.

<sup>64</sup> Graham, *Civil Rights Era*, 342.

<sup>65</sup> By May 1971, not one contractor had been debarred nor had any contract been cancelled. See United States Civil Rights Commission, *The Federal Civil Rights Enforcement Effort: Seven Months Later* (Washington DC: US GPO, May 1971).

<sup>66</sup> "Allen Bids School Aides Around Country Back Job Quotas," *New York Times*, February 15 1970, 3.

<sup>67</sup> United States Civil Rights Commission, *The Federal Civil Rights Enforcement Effort* (1970), 205-207.

<sup>68</sup> Editorial, *New York Times*, March 18 1970, 46.

<sup>69</sup> "Builders and Unions Here Offer Minorities Training," *New York Times*, March 22 1970, 1.

<sup>70</sup> Schuwerk, "The Philadelphia Plan," 760.

<sup>71</sup> *Weiner v. Cuyahoga Community College District*, 58 L.C. 9164 (1968), 60 L.C. 9288 (1969). Cited in Paul D. Moreno, *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America 1933-1972* (London: Louisiana State University Press, 1997), 262.

<sup>72</sup> *United States v. Sheetmetal Workers* (1969), cited in Schuwerk, "The Philadelphia Plan," 760.

<sup>73</sup> Moreno, *From Direct Action to Affirmative Action*, 263.

<sup>74</sup> Moreno, *From Direct Action to Affirmative Action*, 264. See *Contractors Association of Eastern Pennsylvania v. Shultz*, 3 E.P.D. 8180 (1971). Moreno cites *Local 53, International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler*, 59 L.C. 9195 (1969) as the first "quota ordered by a federal court under the Civil Rights Act" (259). Again, there is no evidence that this court decision was not intended simply as a single decision pertinent only to this union. It ordered a union to make referrals on a one-to-one, black-white ratio as affirmative action relief, forbidding "preferential treatment." See Moreno, *From Direct Action to Affirmative Action*, 259.

<sup>75</sup> John D. Ehrlichman, *Witness to Power: The Nixon Years*, (New York: Simon and Schuster, 1982), 228/9.

<sup>76</sup> Nixon scrawled this response to a news item concerning George Meany's attack on the Philadelphia Plan, which he said was designed to win "brownie points" for the Administration with civil rights groups. Jan 13 1970, News Summaries - January 1970, Box 31, POF: Annotated News Summaries, NPMP. See also Graham, *Civil Rights Era*, 340.

<sup>77</sup> See Graham, *Civil Rights Era*, 335-336. In Pittsburgh in August 1969, a clash took place in which 50 blacks and 12 policemen were injured.

<sup>78</sup> Telegram to the President from Mayor Joseph M Barr of Philadelphia, Sep 16 1969, [Miscellaneous...] Folder 2 of 2, Box 21, WHSF: SMOF: Ehrlichman, NPMP.

<sup>79</sup> Memo to the Commission from Ginsburg, Nov 7 1967, plus attached "Survey Paper on Short-Term Domestic Program Options," no date, National Advisory Commission on Civil Disorders - Records, Nov. 1967, Box 465, Papers of Edward W. Brooke, Library of Congress.



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<sup>80</sup> Skrentny entitles one of his chapters “The Politics of Pre-emption.” See *Ironies*, 181.

<sup>81</sup> Cited in “The Administration’s First Year -- Editorial and Column Reaction,” Feb 13 1970, PR 16-3 Presidential News Analysis [1969-70], Box 54, WHSF: WHCF: Subject Files: Confidential Files 1969-74, NPMP. Moynihan uses the term in a memo to the President in late 1969. See Memo for the President from Moynihan, November 25 1969, President’s Handwriting November 1969, WHSF: POF, NPMP. See also Memo for HR Haldeman from Colson, Sep 14 1970, where even the ultra-partisan Colson admits that “Our best defense [against the Democrats making an issue one of burning importance], wherever possible, is to pre-empt the field (as we did with the environment.)” Labor Campaign [1 of 2], Box 77, WHSF: SMOF: Colson, NPMP.

<sup>82</sup> William Safire, *Before the Fall: An Inside View of the Pre-Watergate White House* (New York: Doubleday and Co., 1975), 265.

<sup>83</sup> Safire, *Before the Fall*, 266.

<sup>84</sup> Fear of racial violence outweighed the common conviction that civil rights had gone too far. See Gallup poll of July 6 1970, Polls/Race [CFOA 10179], Box 143, WHCF: SMOF: Garment, NPMP.

<sup>85</sup> Nixon, according to former Nixon administration staff member, Bradley H. Patterson, told the EEOC that there would be “no quotas” while he was president. However, several documents indicate that the term quota was used – apparently unproblematically – to refer to various programs connected to civil rights. See, for example, *The Nixon Administration Civil Rights Report*, which, amongst its boasts about Nixon’s civil rights accomplishments, states that: “The Civil Service has approved a modified quota hiring system for blacks, spanish-speaking Americans and American indians (sic) for government jobs.” [Ex] HU2 Equality - Beginning 4/2/69, Box 3, White House Central Files: Subject Files: HU [Ex] HU, NPMP.

<sup>86</sup> [Civil Rights] Background Material for *The Reluctant Guardians: A Survey of the Enforcement of Federal Civil Rights Laws* by Barney Sellers [CFOA 908], no date but issued sometime in May 1969, Box 61, WHCF: SMOF: Garment, NPMP. See also Graham, *Civil Rights Era*, 374.

<sup>87</sup> Of course, the department of Health, Education and Welfare (HEW), for which Panetta worked, did not deal with employment. But Panetta’s book makes very clear the fact that school desegregation made headlines while affirmative action did not. See generally Leon E. Panetta and Peter Gall, *Bring Us Together: The Nixon Team and Civil Rights* (New York: J. B. Lippincott Company, 1971).

<sup>88</sup> Draft Response dictated by Ray Price 5/17/71, Black Caucus Report and Reviews [2 of 6] [CFOA 463], Box 47, WHCF: SMOF: Garment, NPMP.

<sup>89</sup> Memorandum for the President from Ehrlichman, March 9 1970, President’s Handwriting: January 16 thru 31, 1970, Box 5, WHSF: POF: President’s Handwriting, NPMP. See also Memo to the President from Garment, Nov. 23 1970, [Ex] HU2 Equality - Beginning 4/2/69, Box 3, WHCF: Subject Files HU [Ex] HU, NPMP. The downside, Garment explained, would be that George Meany, president of the AFL-CIO, might grumble. Nixon, by that stage busily courting labor with the 1972 election in mind, scotched Garment’s idea.

<sup>90</sup> See *Index to the New York Times*, 1970 (New York: New York Times Publications, 1971), *Index* 1971 (1972) and *Index* 1972 (1973).

<sup>91</sup> “EEOC Bill Compromise,” *New York Times*, September 16, 1971, 16.

<sup>92</sup> CR, 92<sup>nd</sup> Congress, Vol. 117, Part 24, September 15 1971, 31984.

<sup>93</sup> CR, 92<sup>nd</sup> Congress, Vol. 117, 32089.

<sup>94</sup> There is some contention amongst historians about the issue. Herman Belz has argued that the choice was between two different ways of administering quotas: “By then, the issue was not affirmative action preferences versus color-blind equal employment opportunity. Rather, it was quotas administered by the Nixon Labor Department as against quotas under the control of EEOC, with its political ties to the civil rights lobby and under congressional oversight.” Herman Belz, *Equality Transformed: A Quarter-Century of Affirmative Action* (London: Transaction Publishers, 1992), 74. Belz is clearly wrong on this point, though, as the amendment, both in letter and spirit, would have outlawed affirmative action.

<sup>95</sup> CR, 92<sup>nd</sup> Congress, Vol. 117, 32090.

<sup>96</sup> CR, 92<sup>nd</sup> Congress, Vol. 117, 32100.

<sup>97</sup> CR, 92<sup>nd</sup> Congress, Vol. 117, 39021.

<sup>98</sup> CR, 92<sup>nd</sup> Congress, Vol. 117, 32097.

<sup>99</sup> CR, 92<sup>nd</sup> Congress, Vol. 117, 32108.

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- <sup>100</sup> CR, 92<sup>nd</sup> Congress, Vol. 117, 32108.
- <sup>101</sup> CR, 92<sup>nd</sup> Congress, Vol. 117, 32098.
- <sup>102</sup> "EEOC Bill Compromise," *New York Times*, Schuwerk, "The Philadelphia Plan," 754.
- <sup>103</sup> Quadagno, *The Color of Welfare*, 80. To back up her assertion, she cites Russell K. Schutt, "Craft Unions and Minorities: Determinants of Change in Admission Practices," *Social Problems*, Vol. 34, No. 4, (October 1987), 388-400. However, Schutt's article examines black employment in craft unions from 1967-1973. In fact, he indicates that the greatest gains during this period occurred after black protests in the late 1960s, not in the early 1970s, as Quadagno asserts. In other words, black protest – not the Philadelphia Plan – worked. The second statement regarding the colour of the employees of government contractors is even more questionable. Quadagno cites Christopher Jencks, *Rethinking Social Policy: Race, poverty and the underclass* (New York: Harper Perennial, 1992). Jencks does not footnote this obviously impressionistic statement and, given that an estimated one third of the nation's workforce in 1970 was employed by government contractors, its accuracy is, to say the least, unlikely.
- <sup>104</sup> United States Civil Rights Commission, *The Federal Civil Rights Enforcement Effort* (1970), 209.
- <sup>105</sup> "New Jobs Plan: 10,000 Quota Promised For Minorities," *Chicago Tribune*, July 17 1972, I, 2.
- <sup>106</sup> News Report, *Los Angeles Times*, June 7 1972, I, 2.
- <sup>107</sup> Blumenthal, "Westchester Revisited," 7.
- <sup>108</sup> "Jobs Plan Scrapped," *Chicago Tribune*, 18 July 1972, I, 2. See also the *Chicago Tribune* editorial 20 July, 1972, I, 14. Hill, "The Construction Industry: Evading the Law," 33.
- <sup>109</sup> Transcript of White House Press Conference of George P. Shultz, Director, Office of Management and Budget, and Arnold R. Weber, Associate Director, Office of Management and Budget, May 19 1971, Black Caucus I [2 of 2] [CFOA 463], Box 46, WHCF: SMOF: Garment, NPMP. See also Memo for Shultz from Mark Alger, Chief, General Government Program Division, no date [presumably, given its location, this memo was from May 1971], Black Caucus Report and Reviews [2 of 6] [CFOA 463], Box 47, WHCF: SMOF: Garment, NPMP.
- <sup>110</sup> Memo to Garment from LH Silberman, Under Secretary of the US Department of Labor, Black Caucus Report and Reviews [2 of 6] [CFOA 463], Box 47, WHCF: SMOF: Garment, NPMP.
- <sup>111</sup> "US Approves Chicago Plan," *Chicago Tribune*, January 12 1972, I, 1, and "Peoria Job Plan Gets Federal OK," *Chicago Tribune*, July 28 1972, I, 2.
- <sup>112</sup> United States Civil Rights Commission, *The Challenge Ahead: Equal Opportunity in Unions* (Washington DC: GPO, May 1976), 173, 176, 179. See also Robert W. Glover and Ray Marshall, "The Response of Unions in the Construction Industry to Antidiscrimination Efforts" in Leonard Hausman et al, *Equal Rights and Industrial Relations* (Madison, WI: Industrial Relations Research Association, 1977), 120-140. They argue that the hometown plans were ineffective.
- <sup>113</sup> Black Caucus Spring '71 Report and Reviews I [1 of 3] [CFOA 10172], Box 48, WHCF: SMOF: Garment, NPMP. See the United States Civil Rights Commission report, *The Federal Civil Rights Enforcement Effort: A Reassessment* (Washington DC: US GPO, 1973) and Arthur Fletcher, *The Silent Sell-Out: Government Betrayal of Blacks to the Craft Unions* (New York: The Third Press, 1974).
- <sup>114</sup> Hill, "The Construction Industry: Evading the Law," 27.
- <sup>115</sup> United States Civil Rights Commission, *The Federal Civil Rights Enforcement Effort: One Year Later* (Washington, DC: United States Civil Rights Commission Clearinghouse Publication 34, November 1971). A copy is also held in the file marked Civil Rights - Fall 1971, Review [1 of 2][CFOA 908], Box 58, WHCF: SMOF: Garment, NPMP.
- <sup>116</sup> United States Civil Rights Commission, *The Federal Civil Rights Enforcement Effort: A Reassessment* (1973), 74.
- <sup>117</sup> United States Civil Rights Commission, *The Challenge Ahead*, 290. Schuwerk states that the goals were 19-26 percent for this year. See Schuwerk, "The Philadelphia Plan," 742.
- <sup>118</sup> Cited in United States Civil Rights Commission, *The Challenge Ahead*, 196. Many of the early assessments of the Plan discuss the problem of motorcycling. See Schuwerk, "The Philadelphia Plan," 751. Nash also mentions the problem and includes a section on the specific problems encountered in Washington, DC. Nash, "Affirmative Action Under Executive Order 11,246," 241-243.
- <sup>119</sup> United States Civil Rights Commission, *Federal Civil Rights Enforcement* (1970), 209.
- <sup>120</sup> Cited in Hill, "The Construction Industry: Evading the Law," 28.

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<sup>121</sup> United States Civil Rights Commission, *The Challenge Ahead*, 166, 7. Jonathon Leonard claimed that “enforcement did become more aggressive in 1973” in his oft-quoted article, “The Impact of Affirmative Action on Employment” [*Social Forces* Vol. 2, No. 4, (Oct. 1984), 388-401]. But by the end of 1976 only 12 companies in total had ever been barred from holding federal contracts under the power invested by the OFCC in EO 11246. (United States Civil Rights Commission, *The State of Civil Rights 1976* [US GPO, February 15 1977], 17). It should be noted that the Civil Rights Commission consistently held the view that affirmative action was not working due to lack of enforcement; several articles have been published to refute this argument. In terms of the construction industry, though, few would take issue with the assertion that affirmative action programs like the Philadelphia Plan and the hometown solutions failed to provide the benefits for inner-city blacks foreseen by Shultz in 1969.

<sup>122</sup> “Jobs Plan Scrapped,” *Chicago Tribune*.

<sup>123</sup> Rhode Island and Delaware had plans that covered state rather than metropolitan areas.

<sup>124</sup> United States Equal Employment Opportunities Commission (EEOC), *Minorities and Women in Referral Units in Building Trade* (Washington, DC: United States General Printing Office, 1972), 20.

<sup>125</sup> As Schuwerk noted, the Philadelphia Plan was based on estimates of “continued growth in the crafts in question, an assumption that time has found to be unwarranted.” Schuwerk, “The Philadelphia Plan,” 742, 743.

<sup>126</sup> “Economic Slowdown Hampers Programs to Aid Poor in Cities,” *New York Times*, May 21 1970, 1, News Report, *New York Times*, March 8 1970, 2. Edwin L. Dale, Jr., “Rate of Job Growth Remains Sluggish,” *New York Times*, January 10, 1970, 15, Quadagno, *Color of Welfare*, 84.

<sup>127</sup> Paul Delaney, “US is Spurring Efforts to Fight Job Prejudice,” *New York Times*, January 19 1974, 43.

<sup>128</sup> Cited in Stephen E. Ambrose, *Nixon, Volume II: The Triumph of a Politician 1962-1972* (London: Simon and Schuster, 1989), 521.

## **Chapter 7**

# **NIXON'S OTHER "GOOD DEEDS": ADMINISTRATION INITIATIVES CONTRIBUTING TO THE INSTITUTIONALISATION OF AFFIRMATIVE ACTION**

The Philadelphia Plan and the hometown plans may have been, ironically, the least successful of affirmative action programs initiated by the Nixon Administration. After the Philadelphia Plan's acid test in Congress in 1969 (and even more so after the Courts backed it), other programs designed to use the Federal Government's financial muscle to insist on black representation emerged. Instead of being policed inadequately by Federal authorities, these programs succeeded largely by self-policing. They contributed, in the end, more to the institutionalisation of affirmative action than the higher-profile Philadelphia Plan.

One quiet but important initiative by the Nixon administration in 1969 involved a move to reinterpret Executive Order 11246, signed by Johnson on September 23 1965. EO11246 required contractors with the Federal Government to agree not to discriminate in employment on the basis of race, color, religion, sex, or national origin (a 1967 EO superseding 11246 included women alongside minorities). Part III of the order also required recipients of Federal financial assistance to require nondiscrimination clauses in construction contracts financed by Federal assistance. Though the Order had specified any "applicant for Federal assistance" for whom "any grant, contract, loan, insurance, or guarantee" might be given, this language appeared in a section dealing with construction contracts and, presumably, referred to areas given grants by the Federal

government to finance construction.<sup>1</sup> In the four years since the order was issued the order had only been applied only to procurement-type contracts and not to grants, loans, guarantees, or other arrangements for Federal financial assistance.<sup>2</sup>

Assistant Attorney General Jerris Leonard, head of the Civil Rights Division within Justice wrote to Attorney General John Mitchell on February 22 1969 asking him to write to heads of departments that granted financial assistance. Leonard wished to extend the rules on non-discrimination governing federal contractors to *all* recipients of any sort of federal aid – grant and loan recipients rather than simply contractors. “(E)xisting statutory authority,” according to Leonard, could be used to require that “as a condition to receiving the assistance, recipients execute assurances that they will not discriminate on the basis of race, color, creed, or national origin against their own employees.” The assurances would provide “an administrative enforcement mechanism by means of which could be enforced on a day-to-day basis.” “State and local agencies could be required to make regular reports on the number of minority group persons they employ; and the Federal agencies could conduct routine compliance reviews.” Although Leonard felt that court proceedings were normally the best method of enforcement, “the sanction of cutting off funds from state and local agencies would also be available, if needed.” The proposal provided “a vehicle by which the Federal Government could enforce the existing constitutional obligation.”<sup>3</sup>

On April 14 1969 Mitchell sent the proposal with his recommendation to Nixon’s urban advisor, Daniel Patrick Moynihan, Senior Counsel to the President Arthur Burns, and congressional liaison Bryce Harlow, amongst others. Harlow and Burns objected to the proposal on the basis of Congressional opposition; Moynihan

“wholeheartedly” supported the proposal. Assistant Attorney General (and later, Supreme Court Chief Justice) William H. Rehnquist’s office inveighed against the proposal. Rehnquist’s assistant, Richard K. Berg, spotted the importance of extending EO11246 to all recipients of Federal Government money. Though supportive of the proposal as a whole, Berg, argued for a strictly constitutional perspective on 11246 on the basis that the obligation to take affirmative action “has not, to our knowledge, ever received a precise administrative or judicial interpretation, but its inclusion in the passage would certainly appear to denote some broadening of the present legal duties of the affected state and local agencies.” He ended his letter by stating: “It is therefore our recommendation that the assurance be phrased simply in terms which express an obligation co-extensive with that of the Constitution, and that the requirement for ‘affirmative action’ be deleted.”<sup>4</sup> Whether Nixon was directly involved in the final decision of whether or not to extend the remit of 11246 (or, as Rehnquist’s office had requested, to get rid of affirmative action altogether) is unclear from the correspondence. In any case, however, Harlow, Rehnquist and Burns lost the argument. The term affirmative action appeared in the letter to heads of all departments.

This subtle reinterpretation of Johnson’s executive order by Nixon staff in the spring of 1969 represents a substantial broadening of those affected by affirmative action. A background document noted that “the order has historically been applied only to procurement-type contracts and not to grants, loans, guarantees, or other arrangements for federal assistance” and had “seldom applied” to state and local governments. As the document pointed out, though the order required that construction contractors hired by government and other bodies that received federal assistance not discriminate, the order

“does not require that the recipient agency itself not discriminate.” Johnson’s Attorney General Ramsey Clark, in a letter dated June 20 1967, had specifically rejected a similar proposal.<sup>5</sup>

For the first time since WWII, the concept of contract compliance was broadened and set a pattern for future civil rights enforcement that would become much more important in terms of black employment and in creation of the apparatus to enforce affirmative action “targets” than the Philadelphia Plan or any of the “hometown solutions.” Included for the first time were at least two sites where some of the highest profile affirmative action programs were later implemented. The vast majority of universities and colleges – as recipients of federal aid – now came under the remit of 11246, setting up the arguments and disputes that later erupted on campuses and in the pages of academic publications throughout the country and in the Supreme Court in the *DeFunis* and *Bakke* cases. Local and state governments, employing, at the time, larger and larger numbers of people, had been included in the original order but had, traditionally, not been targeted. The ease with which the Federal government could use economic arm-twisting to pressure higher education authorities and state and local government officials stands in contrast to the difficulty it faced against unions and construction contractors.

A second move by the Nixon administration during the first few months of office pressured the largest single employer in the country, the Federal Government, to take positive steps to employ minorities. On March 28 Nixon stated: “I want to emphasise my own official and personal endorsement of a strong policy of equal opportunity within the Federal Government. I am determined that the Federal Branch of

the Government lead the way as an equal opportunity employer.”<sup>6</sup> On August 8 1969 Nixon issued Executive Order 11478 to ensure that affirmative action took place within government employment. Nixon stressed that more than nondiscrimination would have to occur in Federal Government employment:

No more serious task challenges our nation domestically than the achievement of equality of opportunity for all our citizens in every aspect of their lives regardless of their race, color, religion, national origin or sex. ...Discrimination of any kind based on factors not relevant to job performance must be eradicated completely from Federal employment. In addition, we must, *through positive action*, make it possible for our citizens to compete on a truly equal and fair basis for employment and to qualify for advancement within the Federal service.<sup>7</sup>

Despite the fact that the language he used conformed to the anti-discriminatory language contained in the 1964 Civil Rights Act, the shifts within the administration were very real. In November of that year, the US Civil Service Commission (CSC) reported on these changes that had been implemented after EO 11478. Full-time Equal Economic Opportunity representatives had been designated in each CSC regional office to work directly with agencies on EEO provision. “Federal agencies have been directed to develop affirmative action plans in *sufficiently specific detail* to carry out the new directions in equal employment opportunity. Agencies have submitted EEO plans; we have reviewed them; and these plans are now being used to measure agency performance.” The CSC had also developed incentive programs for “managers, supervisors and others in achieving EEO” and “directed agencies to include in the ratings of supervisors and evaluation of their performance in the area of equal employment opportunity so that a measure can be made of their commitment to action in this area.” Memos indicate that the word ‘quota’ was used openly in describing the civil services’ program. Not only did the phrase “sufficiently specific detail” point to “targets



and goals,” the parallels of this enforcement apparatus bears a very close resemblance to the affirmative action machinery in place within the government and in large corporations today.<sup>8</sup>

## Revenue Sharing

One of the problems that prevented the reinterpretation of EO11246 from being effective was the complex nature of the distribution of Federal funding. The profusion of block grants administered by the Johnson administration made it difficult to regulate equal employment within the recipient bodies. The recipient bodies varied in their makeup and many were simply unprepared to report accurately on the makeup of their workforces or the workforce of any contractor. Giving grants to local elected authorities at least eased the difficulties of monitoring and ensured that regulatory procedures could become standardised. Revenue sharing was to become part of Nixon’s attempt, following from campaign promises, to make government more effective.

Revenue sharing was one of the most consistent aspects of Nixon’s (and the Republican Party’s) domestic platform, part of the “New Federalism” that Nixon had promised to both party and nation before the election.<sup>9</sup> During the previous two Democratic administrations, and particularly in relation to Great Society policies, categorical grants had been given directly to representatives of recipient groups, bypassing local elected authorities. These grants were designed to meet some need that ostensibly met some national need, such as Federal aid to disadvantaged children. By 1969 there were at least 500 categorical grants programs as more and more areas of

concern appeared, administered by various agencies in various departments, some inevitably overlapping. The problem of categorical grants had been in existence for some time and reform of the Federal Grant program had been initiated under Truman and Eisenhower. As was the case with so many of Nixon's programs, Johnson had begun to move towards reforms but had not implemented his plans by the end of his tenure.<sup>10</sup>

With revenue sharing, Nixon wished to provide funds in the form of block grants directly to state and local administrations, bolstering their authority amongst recipients, giving them more power and responsibility. The idea Nixon had in mind when he proposed the General Revenue Sharing Act of 1969 (first touted in April 1969<sup>11</sup>) was to strengthen the links between individual citizens and their governments, to revitalize local and state politics. Nixon held forth on the issue continually throughout 1969: "If there is one thing we know, it is that the Federal Government cannot solve all the nation's problems by itself; yet there has been an overshift of jurisdiction and responsibility to the Federal Government. We must kindle a new partnership between government and people, and among the various levels of government."<sup>12</sup> Nixon's impetus toward revenue sharing and reform of the Federal Grant program was clearly borne of the recognition that the reforms of the 1960s had created an impersonal, bureaucratic, dehumanised and centralised form of government and that reforms returning power closer to the people had to be implemented. More specifically it was designed to "alleviate a malaise caused by the breakdown of Great Society expectations without overreacting and shutting off aid entirely."<sup>13</sup> Another problem it was designed to address was the alienation of the average American from local politics; voters barely participated in local elections in the late

1960s. It was estimated in 1968, for example, that less than 30 percent of the voter age population casts a ballot in separately held city elections.<sup>14</sup>

Nixon, however, struggled with an uncooperative Congress in his efforts to enact revenue sharing. He managed to create only two block grants before he resigned despite six years of continuous (if not intense) struggle, and both differed substantially from what the president initially proposed.<sup>15</sup> However, when the Revenue Sharing Act was finally signed into law on October 20 1972, the newly created Office of Revenue Sharing gained power over all aspects of the program being funded through nondiscrimination provisions in the Act. For example, if money was used to buy police cars, nondiscrimination provisions of the Revenue Sharing Act then also extended to employment practices, police protection services, treatment in jails and other functions of the police department. The Act provided for auditing including “possible failure to comply substantially with the civil rights provisions of the law.” It was the first federal agency to include civil rights matters as part of regular audit requirement.<sup>16</sup>

## Minority Business Enterprise

Perhaps the greatest contribution of the Nixon administration to creating a quota-based affirmative action paradigm was the Minority Business Enterprise program. Fulfilling his promise made during the 1968 election campaign to give blacks “a piece of the action,” Nixon signed Executive Order 11458 on March 5 1969, creating the Office of Minority Business Enterprise (OMBE). Again, the blueprints for minority business schemes had been drawn but never developed under Johnson, who developed “Project

Own” within the Small Business Administration (SBA) in August 1968 to increase loans to black businesses. Johnson had instead emphasised that loans went to help the poor of whatever race in the slums.<sup>17</sup> Nixon publicised the signing of the Executive Order widely.

He signalled the direction in which he wished the new agency to progress:

This is not a substitute for the many other efforts that continue to be needed if we are to make headway against the ravages of poverty. It is a supplement, dealing with a special but vital part of the broader effort to bring the members of our minority groups into full participation in the American society and economy. What we are doing is recognizing that in addition to the basic problems of poverty itself, there is an additional need to stimulate those enterprises that can give members of minority groups confidence that avenues of opportunity are neither closed nor limited; enterprises that will demonstrate that blacks, Mexican-Americans and others can participate in a growing economy on the basis of equal opportunity at the top of the ladder as well as on its lower rungs.<sup>18</sup>

The new OMBE had no program budget and no authority. The OMBE functioned in a “leadership and catalytic role;” its remit was to co-ordinate the efforts of 116 existing programs in 21 different federal agencies. It had 10 employees and a total budget of \$46,000 in 1969.<sup>19</sup> The SBA, created by the Small Business Act of 1953, began a procurement program called 8(a) after the establishment of the OMBE that provided “for the reservation of a certain proportion of government contract business to minority firms.”<sup>20</sup> The OEO made grants under Title 1D of the Economic Opportunity Act to provide advice, counsel and technical assistance for present and future minority entrepreneurs in special impact areas. The EDA (Employment Development Agency) operated in “depressed areas,” making business loans where the SBA cut off at \$350,000 and providing technical assistance for entrepreneurs.

Few took the idea very seriously when Nixon first touted the idea (including Nixon himself). The Russell Sage Foundation put up money for a conference of scholars on Black capitalism. However, as conservative intellectual Irving Kristol

indicated to Daniel Patrick Moynihan, many intellectuals had already discarded the idea as hopeless. Kristol said that “[o]ver these past months, I have concluded that it [economic regeneration of the ghetto through themes such as black capitalism] has only a little substance, of a not terribly interesting variety, and I therefore lost interest in the conference.” There is no record of the conference ever occurring.<sup>21</sup> Privately, Nixon held out little hope for minority enterprises. Writing notes just five days after signing EO 11458 in the margin of a news report concerning the failure of the Watts Manufacturing Company, Nixon delivered a message to Commerce Secretary Maurice Stans, whom he had asked to manage the new agency:

To Stans

This shows the enormous problems in our minority enterprise program

1. Any small business has a 75% chance of failing

2. Minority small business has a 90% chance of failing

good luck!<sup>22</sup>

After boasting at the start of the program that “hundreds of companies” would make millions of dollars available to minorities, only nine companies, even by the summer of 1970, had kept to their commitment of \$150 thousand each with two-to-one federal matching money and not all of that nine had granted loans after a year of the program.<sup>23</sup> In June of 1969, Phillip Pruitt, head of the Small Business Administration’s (SBA) minority entrepreneurial program, an important creation of the OMBE, resigned with a blast at the administration for failing to give adequate financial support for the high-profile black business program. By the end of the summer Frank Hoy wrote in the *Washington Post* that “It has now become apparent that the practical problems were fundamentally underestimated.” A severe critic of “black capitalism” was Andrew Brimmer, the only black member of the Federal Reserve Board and whom Nixon claimed

had backed the idea during the campaign. Hoy noted that “(n)ot one non-governmental witness, from Roy Innis, chairman of CORE, to the American Bankers Association commended the Administration.”<sup>24</sup> Developments during the first year of the OMBE’s existence did not augur well, to say the least.<sup>25</sup>

But the OMBE retained a political importance for Nixon because of its ideological acceptability to conservatives such as Texas Republican Senator John Tower as well as because of Nixon’s high profile promise to give blacks “a piece of the action” through “black capitalism.” It simultaneously met the liberal demand to “do something” about the ghettos and the conservative proposition that capitalism was the solution to the problems of the ghettos. The OMBE’s historical significance was as a stream that would feed into the quota-based affirmative action paradigm. Though, at this stage, the OMBE meant little programmatically, it prefigured the “set-asides” that would later be castigated by opponents of affirmative action. Still at the “experimental” stage in 1969, it increased its total worth of minority contracts from \$8.9m in 1968 to only \$10.4m by the middle of 1969. Although Congress appropriated \$36m for SBA loans, Nixon froze the funds, forcing the SBA to rely on bank loans at 12 percent interest. However, during fiscal year 1969, the SBA’s loans to minority groups had nearly tripled - from 1676 contracts worth \$29.9m to 4120 worth \$93.6m.<sup>26</sup> The OMBE that Nixon had privately mocked grew into a huge and important program. OMBE’s operational budget skyrocketed from a pathetic \$46,000 in 1969 to \$52.5m in FY1974.<sup>27</sup> By May 1971 422 new contracts had been added worth \$35.2m. By the end of that year, there were 811 contracts worth \$65.4m; in financial year 1972 a total of 1714 contracts were worth \$149.4m. Lending to minority enterprises under the program increased from \$28m in 1968 to \$217m in 1971. In 1975

the Small Business Administration gave loans and guarantees to minority enterprises totalling \$651m.<sup>28</sup> Despite Nixon's early reservations, the agency became an important part of civil rights efforts not only of his administration but for subsequent administrations up to the present day. In *Fullilove v. Klutznick* (1980), the Supreme Court backed a congressional program that set aside 10 percent of federal construction contracts to firms owned by minorities. The presiding judge noted that Congress, "for the first time in the Nation's history has created a broad legislative classification for entitlement to benefits based solely on racial characteristics."<sup>29</sup> Such was the legacy of this program.

From the beginning, the administration admitted that quotas would be established for the OMBE. At a meeting that was probably held in September 1969 (the document has no date but was found amongst documents dated September 1969), John Ehrlichman recorded a meeting about the SBA. Besides noting that a "new attitude" was necessary (For those administrating? For the administration itself?), Ehrlichman noted in a matter-of-fact style that "Quotas estab."<sup>30</sup> In fact, this program – not the Philadelphia Plan, the hometown plans or Order No. 4 – crystallised the legal, philosophical and ethical concerns of administration officials over the efficacy of the racial basis of OMBE award programs. An undated document (from its location, it appears to have been written in mid-1970) entitled "Rationale for Delivery System & Federal Restructuring" listed under a heading, "The Problem:" "The Constitutional question - present eligibility under the OMBE focus is determined on the basis of race. According to several constitutional lawyers this raises serious 14th Amendment questions." The document also noted that "the emphasis on race in the minority enterprise program has a polarizing effect and contributes to the alienation of ethnic and blue-collar whites."<sup>31</sup> Similarly, a Treasury

Department memo to Leonard Garment, special consultant to the President, dated December 15 1970, indicated concern that it was “exceedingly difficult to concentrate economic benefits on economic activity selected only by the racial characteristics of the would-be entrepreneurs.” A memo from “Procurement and Size Standards” in the SBA in 1969 to Terrence Scanlon, a program officer in the OMBE, indicated a working definition for the term “minority” in its 8(a) program but confusingly added that, in fact, 8(a) was open to those of any race.<sup>32</sup> Administration official Peter M. Flanigan also argued over who constituted a “minority” for the purpose of the OMBE: “It’s one thing to help the Blacks who are admittedly underprivileged. Its quite another thing to suggest that simply because someone has an ethnic background (like me) he deserves special attention for job placement.” (There is no indication, however, that “Irishness” was included as a minority for the purposes of the OMBE!) Though the Philadelphia Plan existed at this time, no one in the administration debated these points in relation to it. These early programs were certainly the rehearsal for the “quota” issue that would arise later.

Nixon had promised in campaign speeches that “there is no significant area where additional civil rights legislation is needed.”<sup>33</sup> He told Americans that the Republicans were “the party not of empty promises, but of performance.”<sup>34</sup> He set out to make existing civil rights legislation more effective by implementing programs that would work. The Philadelphia Plan, despite its high profile, did not work but these other programs initiated more quietly, did. They constituted what Hugh Davis Graham called “rulemaking to bind recipients of federal dollars.”<sup>35</sup> All of these programs contributed to the affirmative action paradigm. Whether or not Nixon himself was involved in creating



these programs or in the decisionmaking process surrounding them – apart from the Philadelphia Plan – is unclear from the evidence. But it is entirely clear that Nixon directed policy away from attempting to reform the ghettos and towards creating stability within the black middle class, the subject of the next chapter.

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<sup>1</sup> See Appendix II.

<sup>2</sup> One Republican document boasted that the Republican Party “put teeth in to Executive Order 11246 - which sat four years without significant action after it was issued in 1965.” While there is no date on the document, entitled “GOP Nationalities News,” it attacked Democratic frontrunner Edwin Muskie, indicating that it was probably published in late 1971. (GOP Nationalities News, Box 125, RNC Records.)

<sup>3</sup> *Memorandum to the Attorney General* from Jerris Leonard, Feb 22 1969, Files of John Ehrlichman re: EEOC # 168 [CFOA 7730], Alpha-Subject Files, WHCF: SMOF: Garment, NPMP. *Memorandum to John Ehrlichman from the Attorney General*, April 14 1969, [CF] HU2-2 Employment [1969-1870], Box 35, WHSF: WHCF: Subject Files: Confidential Files, NPMP.

<sup>4</sup> *Memorandum from Richard K. Berg*, Office of Legal Counsel, to William H. Rehnquist, Assistant Attorney General, March 19 1969, [CF] HU 2-2 Employment [1969-70], Box 35, WHSF: WHCF: Subject Files, Confidential Files, NPMP.

<sup>5</sup> *Ibid.*

<sup>6</sup> Letter from Bryce N. Harlow, Assistant to the President, to Honourable William Clay, House of Representatives, April 11, 1969, Boxes 17, 18 [Gen], WHCF: Subject Files: HU (Human Rights), [Ex] HU2-2 Employment, NPMP.

<sup>7</sup> *Memorandum on Equal Employment Opportunity in the Federal Government. August 8, 1969, Public Papers of the Presidents of the United States: Richard Nixon, 1969* (Washington DC: United States Government Printing Office, 1970), 635.

<sup>8</sup> United States Civil Service Commission, *Preliminary Report of Minority Group Employment in the Federal Government*, 1969 (Washington DC: US GPO, 1969), 8.

<sup>9</sup> Moynihan, speaking to an assembly of Americans for Democratic Action (ADA) on Sept 9 1967, stated that “...liberals must divest themselves of the notion that the Nation, especially the cities of the Nation, can be run from agencies in Washington... If State and local government is to assume an effective role as an innovative and creative agent, it simply must begin to receive a share of Federal revenues on a permanent, on-going basis.” (copy of speech in “P&R Memo, House Republican Conference, Planning and Research Committee, Rep. Charles E. Goodell [NY], Chairman, Human Needs,” 1968 Republican National Convention, Box 60, RNC Papers). In 1966 Republican Robert Taft, Jr., presented a paper entitled “Financing the Future of Federalism: The Case for Revenue Sharing.” (Minutes of the Meeting of the Republican Coordinating Committee, March 28 1966, Republican Coordinating Committee, March 28 1966, Republican Coordinating Committee 1965-1968, Box 80, RNC papers.)

<sup>10</sup> See Timothy J. Conlan, “The Politics of Federal Block Grants: From Nixon to Reagan,” *Political Science Quarterly*, Vol. 99, No. 2. (Summer, 1984), 247-270.

<sup>11</sup> Special Message to the Congress on Forthcoming Legislative Proposals Concerning Domestic Programs, April 14, 1969, *Public Papers of the Presidents: Richard Nixon, 1969*, 284.

<sup>12</sup> Special Message to the Congress on Forthcoming Legislative Proposals Concerning Domestic Programs. April 14, 1969, *Public Papers of the Presidents: Richard Nixon, 1969*, 287.

<sup>13</sup> William Safire, *Before the Fall: An Inside View of the Pre-Watergate White House* (New York: Doubleday and Co., 1975), 229.

<sup>14</sup> “New Directions For Urban America,” draft 3/19/68, Human Needs, 1968 Republican National Convention, Box 60, RNC Records. For an excellent discussion of the recreation of American institutions and what he calls the “reshaping of liberalism,” see Sidney M. Milkis, “Remaking Government Institutions in the 1970s: Participatory Democracy and the Triumph of Administrative Politics,” *Journal of Policy History* Vol. 10, No. 1, (1998), 53-70.

<sup>15</sup> Conlan, “The Politics of Federal Block Grants,” 252.

<sup>16</sup> United States Civil Rights Commission, *Making Civil Rights Sense out of Revenue Sharing Dollars* (Washington, DC: USCRC Clearinghouse Publication 50, February 1975), 39.

<sup>17</sup> Though Nixon clearly highlighted “black capitalism” as his own initiative, both the Kennedy and Johnson administrations had investigated, at least, the possibility of providing contracts to minority firms. They failed to act, however, as a report published in early 1969 complains. See folder entitled [Civil Rights] Background Material for The Reluctant Guardians: A Survey of the Enforcement of Federal Civil Rights Laws by Barney Sellers [CFOA 908], Box 61, WHCF: SMOF: Garment, NPMP.

<sup>18</sup> Statement by the President on Minority Enterprise, March 5 1969 and attachments, Files of John Ehrlichman re: EEOC # 379 [CFOA 7730], Box 86, WHCF: SMOF: Garment, NPMP.

<sup>19</sup> Edward W. Brooke “Black Business, Problems and Prospects,” *The Black Scholar*, (April 1975), contained in *Subject File: Blacks - miscellaneous 1967-76*, Box 415, Papers of Edward W. Brooke.

<sup>20</sup> Memo from Shultz to the President (a review of the administration’s civil rights programs, received May 18 1971), Black Caucus I [1 of 2] [CFOA 463], Box 46, WHCF: SMOF: Garment, NPMP.

<sup>21</sup> Letter from Irving Kristol to Moynihan, March 25 1969, [Gen] HU2 Equality 1/31/69, Box 5, WHCF: Subject Files: HU (Human Rights), NPMP.

<sup>22</sup> Staff and Department Briefs, March 10 1969, News Summaries - March 1969, Box 30: Jan 1969 - September 1969, POF: Annotated News Summaries, NPMP. The Watts Manufacturing Company, as noted in the Nixon memo, had a status of “delinquent” on 6 of 11 contracts it held with various government agencies. Only five minority companies at that time had contracts worth \$1m or more. The vast majority held contracts worth less than \$50,000. See Status Report of 8(a) Contracts, Small Business Administration, Office of Associate Administrator for Procurement and Management Assistance (PMA), Office of Business Development (OBD), Division of Government Contracts, April 30 1971, Civil Rights Accomplishments [1 of 2][CFOA 907], Box 57, WHCF: SMOF: Garment, NPMP.

<sup>23</sup> See “Nixon and Blacks: Substance and Symbol,” edit., *The New Republic*, (July 18 1970), 7-8.

<sup>24</sup> “Bleak Facts Slow Black Capitalism,” Frank, Hoy, *The Washington Post*, Sunday, Aug 31 1969, in Files of John Ehrlichman re: EEOC # 379 [CFOA 7730], Box 86 WHCF: SMOF: Garment, NPMP.

<sup>25</sup> Nor did past experience look promising. The majority of SBA loans in 1967 went to funeral and nursing homes, dry cleaners, grocery stores, hotels, rooming houses, etc. See editorial article “Where its at: Black Capitalism” in *Business and Society* (“a bi-weekly report on business and social responsibility,”) December 17 1968. Copy contained in EEOC - 1970 [1 of 2][CFOA 7730], Box 85, WHCF: SMOF: Garment, NPMP.

<sup>26</sup> Anonymous memo to Mr. Terrence M. Scanlon, Office of Minority Business dated 15 December 1969, Equal Employment Opportunities Commission (EEOC) – 1970 [2 of 2][CFOA 7730], Garment: Alpha Subject Files, Box 35, WHSF: SMOF: Garment, NPMP.

<sup>27</sup> Brooke “Black Business, Problems and Prospects.”

<sup>28</sup> Shultz to the President, May 18 1971. Letter to the President from Thomas A. Kleppe from the SBA, dated 6/6/73, Box 5, WHCF: Subject Files: HU (Human Rights), NPMP. Highlights of Administration Initiatives in Civil Rights and Related Programs, Stanley S. Scott, February 1974, Box 5, WHCF: Subject Files: HU (Human Rights), NPMP. Other relevant material shows the growth of the SBA program in particular:

FY	No.	Value	Companies awarded contracts
1968	8	\$10.494m	7
1969	30	8.884m	18
1970	196	22.208m	136
1971	412	34.079m	248

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(Status Report of 8(a) Contracts, Small Business Administration, Office of Associate Administrator for Procurement and Management Assistance (PMA), Office of Business Development (OBD), Division of Government Contracts, April 30 1971, Civil Rights Accomplishments [1 of 2][CFOA 907], Box 57, WHCF: SMOF: Garment, NPMP. Kleppe's report noted that growth continued, though more slowly in 1972-73. It also expressed the opinion that earlier reports had underreported. Under Section 8(a) of the Small Business Act:

Fiscal Year 1973	2016 contracts	\$217,415,289
FY 1972	1714 contracts	\$149,379,813
FY 1971	811 contracts	\$65,387,218

(Kleppe to the President, 6/6/73).

<sup>29</sup> Hugh Davis Graham, "Civil Rights Policy in the Carter Presidency," in Gary M. Fink and Hugh Davis Graham, *The Carter Presidency: Policy Choices in the Post-New Deal Era* (Lawrence, Kansas: University Press of Kansas, 1998), 202-223, 208.

<sup>30</sup> Handwritten Notes of a meeting, no date (probably September 1969), Files of John Ehrlichman re: EEOC [CFOA 7730], Box 86, WHCF: SMOF: Ehrlichman, NPMP.

<sup>31</sup> Rationale for Delivery System & Federal Restructuring - A Brief, no date, Minority Business Files: Expanded Ownership [2 of 5][CFOA 7201], Box 125, WHSF: SMOF: Garment, NPMP.

<sup>32</sup> Letter to Scanlon, Dec 15 1969.

<sup>33</sup> Cited in Memo to Ken Cole from Arthur Burns, October 9 1969, [Domestic Policy], Box 137, WHSF: SMOF: Haldeman: Alpha Subject Files, NPMP.

<sup>34</sup> Republican Platform 1968, "We must think anew and act anew," adopted by the RNC August 6 1968, contained in file marked Political Analysis [Busing][CFOA 10177], Box 54, WHCF: SMOF: Garment, NPMP.

<sup>35</sup> Hugh Davis Graham, "Legacies of the 1960s: The American 'Rights Revolution' in an era of divided governance," *Journal of Policy History*, Vol. 10, No. 3, 1998, 159-172," 164.

## Chapter 8

### CHANGE IN POLICY IN 1970

In 1970 Nixon agonised over decisions about the Vietnam War. Most available archives indicate his preoccupation with it and its repercussions in Congress and throughout the American population. It is possible, in the morass of war-related material, to miss one of the most important changes for race relations policy this century.<sup>1</sup> At this stage, the confusion and profusion of policies, though not stopping by any means, gave way to a clearer picture of the civil rights strategy of the Nixon administration. Many Nixon scholars and civil rights historians agree with Dan Carter that “(t)he year 1970 marked a critical turning point for the Nixon administration.”<sup>2</sup> Most of those arguing that Nixon was led in domestic policy by overriding political concerns see a rightward shift when his more conservative advisers within the administration appeared to win out. Nixon speechwriter William Safire and John Skrentny, among others, have suggested that the hardhat march against the peace campaigners in New York in May 1970 turned the Nixon administration against early liberal civil rights “blunders,” among which they number the Philadelphia Plan.<sup>3</sup> Most agree Nixon clearly wished to capitalise on the sentiments of the “silent majority” that he assumed the hardhats represented. He also feared George Wallace’s ability to capitalise on these sentiments. But questions remain about why Nixon continue to pour money into some civil rights strategies while abandoning others. Clearly, the decisions made at this time indicate more than a move to the right – a more accurate characterisation of the shift might be a *focusing* of policies

devised to aid black Americans, signalling an abandonment of the ghettos in favour of creating a stable black middle class.

Of the highest import in the factors leading to the shift was the fact that the turmoil of the late 1960s appeared to be under control. “For whatever reasons – increased legal, extralegal, and illegal surveillance; the end of the draft; the exhaustion of radical cadres – incidents of New Left and campus violence decreased dramatically after 1970.”<sup>4</sup> Events such as the “New Mobe” had passed off peacefully, 1969 had been riot-free. Nixon’s first priority upon taking office had been to “lower our voices,” to calm what nearly everyone imagined to be an inflamed situation. After a year in office, Nixon took stock of his civil rights efforts. He had done “well where least expected” and “poorly where [he] should have succeeded” commented journalist Joseph C. Harsch in the *Christian Science Monitor* at the end of 1969. “Administration spokesmen see as their greatest success a general lowering of political temperatures on the domestic scene. And they are correct. Why, is a bit of a mystery. Certainly, the administration has not catered to the disgruntled. Its public posture is sternly unsympathetic to rebellious students, and militant Negroes. Yet ghetto streets and college campuses have been less disturbed than in previous years.”<sup>5</sup> Nixon’s advisers agreed, even the “libs” in the camp. Moynihan wrote in 1970 that “(s)uddenly the riots ended. Again, no one knows why. But the demands for ever-increasing municipal services did not end with them. To this moment the typical justification advanced for any new urban program is that it will reduce the likelihood of future urban violence, while the principal argument against any decrease in existing programs is that it will automatically trigger such violence.” Moynihan noted that the problems had changed, indicating that unemployment in the bigger cities was

becoming the primary issue: “As crises go this one is not as dramatic in its onset as the rioting, but it is likely to last longer and have considerably more political impact.”<sup>6</sup> In another 1970 memo, Moynihan advised his president to take credit for the end of the riots: “As you are blamed when it rains (or, in this case, will be if it starts to rain again), you might as well take credit when the sun shines.”<sup>7</sup>

Second, Nixon had fulfilled many of his campaign promises regarding civil rights but continued to fail to placate racial liberals and civil rights organisations. His administration had supported the 1968 Civil Rights Act by bringing suit, in July 1969, against an association of real estate brokers and 13 of its suburban Chicago members, charging racial discrimination in the sale of housing. Efforts at desegregating Southern schools could be called moderately successful, despite the ensuing controversy, and Nixon might have been encouraged by his softer approach to the issue. The 18.4 percent of black pupils attending majority white schools in the 11 Southern states in 1968 had risen to 38 percent in 1970.<sup>8</sup> He had very publicly issued executive order 11458 establishing the Office of Minority Business Enterprise on March 5 1969. With the Philadelphia Plan, Nixon had proved that he would put himself on the line for a civil rights measure. Yet none of these actions – referred to by administration members as “zigs” to counter conservative “zags” – seemed to please his liberal critics or to “blunt the vigor of their resentment and political opposition” as Nixon put it.<sup>9</sup> He had, in regard to the Philadelphia Plan, “gained little on the play.” A disgusted Nixon exclaimed in the summer of 1970 that “(T)he NAACP would say my rhetoric was poor if I gave the Sermon on the Mount.”<sup>10</sup>

Third, the threat from the left, in the form of instability and rebellion, was on the wane, the threat from the right appeared to be waxing. Nixon now worried that to continue the programs of the Johnson administration might weaken his fragile electoral base. In 1970, George Wallace appeared to be more of a threat than did any Democratic candidate – Nixon secretly poured \$400,000 (from his reelection campaign kitty collected and hoarded before the Campaign Reform Act of 1970) into the campaign to elect Wallace’s rival in the gubernatorial race for Alabama, Albert Brewer, in an effort to derail Wallace’s 1972 campaign for the Presidency.<sup>11</sup> The “sweet and reasonable middle” that Nixon had attempted to find in 1969 appeared to be disappearing fast.

Finally, evidence indicated, as Nixon had openly suspected, that many of the policies put in place by the Johnson administration designed to reform the ghettos were ineffective. One of the major problems was the apparent unenforceability of policies aimed at gaining compliance for these efforts. Nixon inherited the Johnson strategy to achieve black equality by ensuring that education facilities were equal, by attempting to integrate the suburbs and to create bases for political participation through the Community Action Programs (CAPs) as well as, through EEOC, and by pushing for black employment gains. By 1970, all programs devoted to achieving these ends languished for want of effective enforcement mechanisms. Though there were modest gains in southern school desegregation, it was found in northern school desegregation cases that private sector actions in real estate and home lending led to residential segregation that made school integration impossible. Busing between school districts became the favoured remedy of the courts but – quite apart from Nixon’s reservations – created a very messy and costly solution. Additionally, it ran up against concerted

opposition from white (and some black) parents that, for racial motives or otherwise, objected to busing their children to different areas or having black children bussed to local schools. Nixon also thought that efforts to desegregate the suburbs would fail. “It is important to break down barriers,” Nixon told a reporter in 1967, “but the fellow who spends all his time talking about open housing is pursuing a will-o’-the-wisp. I know that’s the exciting way to do things. Marching feet. Protests.”<sup>12</sup> After taking office, Nixon felt vindicated in his earlier position. Between January 1 1969, the date the 1968 Open Housing Act became effective, and July 1970, the Housing Section of the Justice Department – despite its reputation as an activist agency (Nixon frequently complained that it was “against us.”<sup>13</sup>), filed only about 50 cases though it received thousands of complaints. By the middle of 1970, HUD had not yet issued regulations spelling out how the Act should be enforced.<sup>14</sup>

The efforts at strengthening black communities through CAPs and other experimental projects in the ghettos had also failed. As soon as capable leaders emerged, they would make it their first priority to get out of the ghetto, quite naturally. Of equal (if not more) concern to Nixon was the fact that ghetto leaders tended to be those most vocal in their opposition to “the system.”<sup>15</sup> Neither, as has been discussed in Chapter 4, could EEOC be counted as a success. It is, of course, possible to argue that the Nixon administration simply did not make adequate efforts to insure that many of these programs would work. But it is undeniable that serious problems faced those who would have implemented these programs. Whereas courts could order large corporations or state and local authorities to change their ways with “pattern or practice” suits, it would be impossible prove cases against individuals. What would be the penalties? Who would pay



for the resolution of the matter? Who specifically was responsible? The more ingrained within American life the problem of racial divisions appeared to be, the more difficult it became for the courts or the federal government to enforce remedies. At the same time the pressure for the administration to do something about the problem of civil rights, especially from powerful liberal interests, was, if anything, increasing. Evidence of these failures poured in during Nixon's first year of office, signifying a crisis of enforcement of civil rights legislation. Yet Nixon had promised to enforce civil rights legislation, stating in his 1968 campaign that no new legislation was needed, only the will to make it work. Nixon made it clear that he would "cut and run" rather than invest more time, effort and money into making these failing programs work.

### Helping the strong instead of the weak

Nixon's answer in the face of these problems – following one of the most important and consistent themes of his presidency – was to further rationalise policy. Instead of policies that aimed at impossible goals, policy would be concentrated on making successes of more limited actions. Instead of concentrating efforts on either destroying or renovating the ghettos, policy would concentrate on aiding a black middle class, not to integrate them into the American mainstream, but to take their place with Americans of other races and ethnicities. Nixon insisted that Black Americans could remain separate in terms of housing, schooling (at least in a *de facto* sense) and even socially but must have the right to earn. Black Americans would no longer be treated as a bloc. Democratic programs that attempted to create equal opportunities by promising

universal benefits, such as Model Cities, housing funds, emergency public-service jobs for the unemployed and community action programs, would be de-emphasised favour of programs that were tailored to specific groups. Ethnic groups and the “silent majority,” a phrase Nixon popularised in a speech in November 1969, would become more prominent.

The crisis that seemed to immediately provoke Nixon’s rethink on civil rights occurred in February 1970 over the school desegregation issue and, especially, because of the departure of Leon Panetta. Nixon ruminated over the problems of race relations. He spent most of the afternoon of February 18 talking to Harriet Elan, “[White House aide Dwight] Chapin’s Negro secretary,” in order to gain the opinions of a “responsible, intelligent Negro.” Haldeman recorded in his diary on February 28<sup>th</sup> that “Obviously, P deeply concerned. Later kept saying to me there’s no adequate solution and nothing we can do in the short haul to settle this, it will have to take one hundred years, but people don’t want to wait.”<sup>16</sup> In the face of repeated failures to alleviate the conditions of the ghettos (and, perhaps, because ghetto rioting was less of a threat than it had been last year) Nixon had attended a meeting with a “black group” that Moynihan had organised.<sup>17</sup> Notes taken by Haldeman (declassified in 1996) indicate the conclusions Nixon was coming to:

Shift of policy of helping and backing the strong - instead of putting all effort into raising the weak  
Recognize there is no “black community”...

how to give the black middle class cultural legitimacy  
blacks - as things get better - feel small slights more...

we should discourage the people who live on agitation  
esp. those on Federal payroll  
create a disincentive for agitation  
build incentives for the strong + positive  
give the fellowships to them instead

don't really know how to help the weak  
+ and even if we did - the proportionate cost is so great...

devise programs to make sure that for those who have made progress, that progress is permanent...  
don't aim manpower programs at unemployed black male teenager...  
directed to street-corner society won't work...<sup>18</sup>

Nixon outlined here a subtle yet significant switch in emphasis for the administration towards racial programs, well before the hardhats marched. The clear message coming from this meeting was: Efforts within the inner city are likely to fail and the focus should now be on creating a stable and strong black middle-class.

Coming so soon after Moynihan's "benign neglect" memo to the President of January 16 1970, many historians as well as contemporary observers concluded that Nixon's shift in 1970 was no less than a counsel to ignore black concerns.<sup>19</sup> Leaked to the *New York Times*, shortly after it was written, the memo caused Moynihan to offer to resign, given the furore attending its publication (his offer was refused by Nixon).

Moynihan wrote that:

The time may come when the issue of race could benefit from a period of "benign neglect." The subject has been too much talked about. The forum has been too much taken over to hysterics, paranoids, and boodlers on all sides. We may need a period in which Negro progress continues and racial rhetoric fades. The administration can help bring this about by paying close attention to such progress – as we are doing – while seeking to avoid situations in which extremists of either race are given opportunities for martyrdom, heroics, histrionics or whatever. Greater attention to Indians, Mexican Americans and Puerto Ricans would be helpful.<sup>20</sup>

Nixon scribbled beside this passage, "I agree." First, however, the point must be made that the memo clearly referred to the *issue* of race and not to African-Americans. The message here, rather than neglect per se, was that racial rhetoric should be toned down. Secondly, other parts of the memo indicate that Nixon used Moynihan's

memos as catalysts for his own thinking rather than direct sources of his ideas. In another section, Moynihan declared:

There is a silent black majority [Nixon circled “majority” and wrote “minority” beside it]... It is mostly working class, as against lower middle class. It is politically moderate (on issues other than racial equality) and shares most of the concerns of its white counterpart. This group has been generally ignored by the government, and the media. The more recognition we can give to it, the better off we shall be.

Taken altogether, Nixon thinking on race appears to been stimulated by this memo but not exactly along the lines set out by Moynihan. Nixon wrote in the margins beside Moynihan’s point, “H- follow up (Graham’s groups and Browns [?] – Negro business men – bankers – Elks, etc. Let’s poll this + go after the probably 30 % who are potentially on our side – Garment et al – are directing our appeal to the wrong group (both in case of Negroes and whites).” In other words, Nixon ignored Moynihan’s “working class” category. He did not decide to neglect blacks. Instead, he sought to stop the issue of race from being used as a sledgehammer against his administration. By dividing up black Americans and concentrating on middle-class blacks (“recognize there is no black community”) he could accomplish this goal by achieving some progress for at least some black Americans.<sup>21</sup>

With regard to civil rights, the theme outlined in his statements to the “black group” came up again and again. In a meeting in June consisting of Haldeman, Ehrlichman, and rising star Charles Colson (with other nameless individuals possibly present), Nixon instructed them to pay attention to the black middle-class: “There are 35 percent of blacks we can do good with,” Nixon told Haldeman. Nixon instructed him to “find \$100 mill[ion] for black colleges” which were “vitally imp[or]t[ant] to have... so blacks dev[elop] capacity to run something... whenever integrated – whites will

dominate.” From this statement, it becomes evident that this switch in policy direction happened for more than just political reasons. Had Nixon wished only to attract votes, he certainly would not have requested \$100m for black colleges. As Moynihan had pointed out in his January 16 memo (and as Nixon agreed), young educated blacks detested white America and this group could hardly be mined for Republican votes.<sup>22</sup> The administration must, Nixon continued, “encourage the good blacks, find some honest Mexicans - have to develop some ‘leadership.’”<sup>23</sup> He worried that the 1964 Civil Rights Act clearly called for efforts to be taken to achieve racial equality but “we recognize clearly that the methods chosen to carry out the law have all failed.”<sup>24</sup>

The political Nixon certainly took Moynihan’s advice to neglect blacks seriously. By July 1970 Nixon instructed his staff to switch priorities in domestic priorities:

We have, for the last year and one-half, overloaded schedule activity to Blacks, youth and Jews. From here on, until further notice, there are to be no Jewish appointments set up per se. There are to be just enough Blacks to show we care... The concentration is now to be on Italians, Poles, Mexicans, Rotarians, Elks, Middle Americans, Silent Americans, Catholics, etc.<sup>25</sup>

A year later, Nixon had distilled the essential message of his instructions when he instructed White House aide Charles Colson:

Blacks  
Youth } forget<sup>26</sup>

Nixon explained to the then-up-and-coming staff member Colson at a staff meeting in July 1970 that the administration “won’t do Watts thing.” An overly solicitous approach to blacks, Nixon said, “doesn’t win Negroes, could alienate whites. Look at Wallace strength in Gallup [poll?]” He told Colson that the administration must “play

more to labor.” Colson, who was the administration liaison between the White House and organised labor, readily agreed.<sup>27</sup>

Many of the programs launched with the purpose of aiding black Americans languished. The Philadelphia Plan received little mention within the administration after Nixon’s success in ensuring congressional attempts to disallow it failed, as discussed previously.<sup>28</sup> Nixon had set forth the Family Assistance Plan (FAP), an initiative by Moynihan, on August 8 1969, a radical overhaul of the welfare state which would have guaranteed an income to all American families. However, the plan, with its attention to alleviating ghetto problems (Nixon told Haldeman in the same month that “you have to face the fact that the whole problem [of welfare] is really the blacks.”<sup>29</sup>) and grand universalist designs, fell out of favour with Nixon in 1970. Even after the House of Representatives approved the Plan by almost two-to-one on April 16 1970, Nixon instructed Haldeman to make sure the effort failed.<sup>30</sup>

The Civil Rights Act of 1968 that outlawed discrimination in housing also appears to have been put on hold. A row broke out between the Department of Housing and Urban Development (HUD), with Secretary George Romney at the helm, and Justice over the *Blackjack* case. To exclude a low- and middle-income-integrated housing project, Blackjack, Missouri, changed its zoning laws. In response, Romney then asked the Justice Department to file suit, a move supported by the Federal Court of Appeals ruling that HUD had an affirmative action responsibility to consider what impact site selection would have on integration. In September 1970, Mitchell called Romney to the White House and told him to back off. “The White House decided to study discrimination in housing, putting all policy decisions on hold until the study was completed. For nearly

a year, the civil rights laws regarding housing were suspended, though hundreds of grants were approved in the interim.”<sup>31</sup>

However, not all black Americans were neglected, lending weight to the theory that Nixon’s ultra-political concern with most issues did not extend to civil rights decisions. Despite continued and even increased hostility from civil rights groups, the Nixon administration steadily increased funding for civil rights programs. Outlays for civil rights enforcement increased as did outlays for civil rights programs generally. In Financial Year (FY)1968, \$64m was earmarked for civil rights programs. In 1969, funding went up to \$75m, in 1970, \$94m, 1971 \$114m, and in 1972 the figure rose to \$141m. Outlays for Title VI compliance, a problem over which the civil rights movement had attacked Johnson, increased between 1969 and 1972 from \$7.5m to more than \$18.6m.<sup>32</sup>

The beneficiary of this shift in course in 1970 was the black middle class. And, unlike the Philadelphia and hometown solutions, the administration could point to some fairly short-term successes. They boasted in 1973 that the total income of blacks rose from \$38.7 billion in 1969 to \$51.1 billion in 1972. State and local government employment has increased steadily – from 6.3m employees in 1960 to 12m in 1975.<sup>33</sup> They could have also pointed to an increase in black and minority employment in full-time state and local government, which, between 1973 and 1974 (after the passage of the Revenue Sharing Act of 1972), increased by 12 percent against a total gain in state and local government employment of nearly five percent.<sup>34</sup> Minority enrolment for master’s and doctoral degrees increased from 7.7 percent in 1970 to 9.1 percent in 1972. The authors of a study critical of voluntaristic efforts to implement affirmative action

programs, had to admit the success of the Nixon administration's pressurising tactics upon minority college enrolment: "(I)t is clear that between 1968 and 1978 these voluntary affirmative action programs did bring thousands of black, Chicano, Native American, and Asian students into universities who otherwise would not have been there."<sup>35</sup> The strategies to build up the black middle classes had worked in a way that attempts to alleviate ghetto conditions had not.

## Busing

Many Nixon scholars have expressed surprise that Nixon could strongly support the Philadelphia Plan even as he came out against busing to achieve racial balance. Here Nixon's position, despite his lack of any sort of corresponding action, was against court-ordered busing from the beginning. At first glance, the two positions appear to be opposite: affirmative action in employment sought to racially balance workforces and busing sought to racially balance student populations. Safire even has Nixon saying in early 1970, while he steered a course between the views of his conservative and liberal advisers, that, after *Brown*: "The subsequent decisions about quotas and racial balance are wrong – you'll delight the racists when you say that, but so what, it's true."<sup>36</sup> However, thematic links exist that connect a position in favour of racially balancing workforces and against racially balancing schools. Both positions are consistent with a belief that the limits to America's ability to integrate black Americans within the rest of the population had been reached.



The weaknesses of a strategy for creating racial equality through education were suggested in the Coleman Report (see Chapter 3). A key point in this study, not missed by Moynihan, was that black scores in SATs in the first grade were far lower than whites'. Negro median test scores were 43.4 for nonverbal and 45.4 for verbal skills. "Majority" scores were 54.1 and 53.2 respectively. Though this difference had grown by 12th grade, the implication that racial inequality developed before children attended school. The report concluded that: "For most minority groups, then and most particularly the Negro, schools provide no opportunity at all for them to overcome this initial deficiency; in fact they fall farther behind the white majority in the development of several skills which are critical to making a living and participating fully in modern society."<sup>37</sup> In other words, the psychological badge of prejudice, the social scientific underpinning of *Brown*, was not as significant as thought in the past. As a researcher who contributed to the Coleman data remembered, "One of the central sociological hypotheses in the integration policy model is that integration should reduce racial stereotypes, increase tolerance, and generally improve race relations. Needless to say, we were quite surprised when our data failed to verify this axiom."<sup>38</sup>

It is unclear whether Nixon saw the report or knew of its findings before he took office. Once in office, Moynihan mentioned the results of the report in at least three memos.<sup>39</sup> A large part of Nixon's public antipathy towards busing can certainly be understood as political grandstanding and, perhaps, as a manifestation of his hatred of liberals who favoured busing. The divisiveness of the issue at the time is remarkable. The National Black Political Convention held in Gary Indiana on March 12 1972 condemned busing to achieve desegregation as "racist, suicidal, methods" based on the "false notion

that black children are unable to learn unless they are in the same setting as white children.” CORE’s Roy Innis, who supported the resolution, was opposed by the NAACP. AFL-CIO President George Meany and the Philadelphia Urban Coalition, on opposite sides of the Philadelphia Plan controversy, both attacked Nixon for his anti-busing position.<sup>40</sup> Nixon supported a moratorium on busing after considering and then backing away from a constitutional amendment in opposition to the Courts’ generally supportive decisions on busing. His reasons, as he told staff, were entirely political; he had not approved of it as a method of rolling back busing orders but as a means of pressurising the Democratic Party. Elsewhere, Nixon considered purposefully losing a vote for a busing moratorium in July 1972 in an effort to avoid the difficulties involved in the issue. In response to a memorandum telling the President that the White House did not have the votes necessary to take any of the pending constitutional amendments to the House floor but had the possibility of securing a moratorium, Nixon scrawled: “E - Maybe it is best not to get this. Then we will have the issue.”<sup>41</sup>

However, even if Nixon had paid scant attention to Moynihan’s memos, he instinctively agreed that efforts to integrate children had failed and were likely to fail. He had consistently held these views even before the report was issued. In 1967, Nixon stated: “It is a mistake to think that the problem in education is going to be met by busing. I am convinced that the damage there would far outweigh the benefits, and besides, most of the problems would remain.”<sup>42</sup> Ehrlichman said of his boss that “(h)e was against busing because he didn’t believe black children would gain anything in the process and certainly the white kids would be disadvantaged by it.”<sup>43</sup> Thus, Nixon felt sure that integration of schools was pointless and potentially harmful. During the early

part of his tenure, he steered away from confrontation with the courts to avoid a constitutional crisis but, as the weight of public opinion moved against busing, Nixon became more forthright in his opposition to it. “Forced busing is wrong,” he told Safire with some feeling early in 1972, “and I don’t care if it does sound like demagoguery – I want to say so loud and clear. The courts don’t believe the folks.” Nixon finished the conversation by saying emphatically, “I happen to believe this.”<sup>44</sup>

The stress on education reflected – in part – the hope that children educated in multiracial schools might overcome some of the damaging racial separation as adults. Black students might become equal by attending better schools; white students might learn tolerance and understanding. The hope of eventual integration of American society is implicit within busing. Affirmative action had, in Nixon’s eyes, the more modest goal of ensuring that black Americans could earn a living. Affirmative action could be divorced from the overall goal of socially engineering an integrated America; busing could not. Those who would have called themselves liberals in 1969 or 1970 would have championed busing for this very purpose. Nixon quietly supported the affirmative action measures and noisily opposed busing to distance himself from the immense expectations of the Great Society while dealing with the race problem as he found it. Employment quotas could be used as part of “federally managed race relations” without any attempt to socially engineer change. An individual like Nixon could harbour doubts about the capabilities of blacks and support quotas in employment as a means of creating racial peace.

At least some of the importance of affirmative action programs lay in their ease of operation. They gave a coherent direction to policy throughout every level of

government and provided links between the White House and a liberal bureaucracy often at odds with its political overlords. Skrentny makes this observation in a recent article: "...whereas judges have often ordered specific firms or public institutions to enforce racial hiring goals as compensation for past discrimination, and some civil rights groups may have made compensation arguments, many of the original justifications for affirmative action were guided by bureaucratic pragmatism."<sup>45</sup> A crisis existed in a bureaucracy that had largely incorporated the mission of the Johnson administration's Great Society but had not successfully implemented many of its programs. Richard Nathan, an official for domestic policy in the Nixon administration for nearly four years, stated that the "relationship between the President and the bureaucracy is the key to understanding domestic affairs under President Nixon."<sup>46</sup> By the middle of 1970, the relationship between the Nixon administration and the bureaucracy appears to be the key reason for the proliferation of affirmative action.

A policy vacuum occurred, more or less, when Johnson's "Great Society" was being abandoned. It affected those who wished to distance themselves from the Kennedy/Johnson administrations more than those who continued to believe in Great Society goals. The Nixon administration, as discussed in earlier chapters, struggled upon taking office to find any real domestic policy direction. In 1969 much of domestic policy simply continued the programs of the previous administration. The overall goal was, at that stage, simply stability. However, more thoughtful members of the administration – Nixon included – worried that some more overarching goal that would determine the direction of domestic policy should be arrived at. In particular, Pat Moynihan mentioned the problem on many occasions. In *The Public Interest* magazine in 1969, Moynihan

published an article entitled “Toward a National Urban Policy” that was widely circulated amongst the Nixon staff. Nixon himself marked a copy that was kept on file. The theme of the article was that an overall policy instead of a collection of aimless programs, was needed. In it Moynihan notes that between 1960 and 1968 the number of government domestic programs rose from 45 to 435.<sup>47</sup>

Nixon’s response, especially after setbacks experienced with his Supreme Court nominations and the response to the FAP, was to blame the intransigence of the bureaucrats for his frustrations. Nixon was constantly at odds with many of those that ostensibly worked for him and had great trouble cutting back programs he had targeted. As Melvin Small comments, “Nixon faced an iron triangle of bureaucrats, lobbyists, and members of Congress who together could either alter or sabotage programs... Of most concern was the permanent bureaucracy, many of whom were liberals or Democrats.”<sup>48</sup> In the summer of 1971, Nixon complained, “We’ve checked and found that 96 percent of the bureaucracy are against us; they’re bastards who are here to screw us.”<sup>49</sup> Later that year, Nixon responded to a news item concerning a column that called the bureaucracy “the strongest political force in the nation and the most serious threat to freedom.” Nixon noted to Haldeman that although a public refutation was necessary, “there was a lot of truth in the Editorial.”<sup>50</sup>

He sent out feelers to staff, asking for their ideas on what the administration domestic policy was and what future domestic policy might entail. On July 21 1969 Nixon took one of his many philosophical turns in a meeting with his aides. Amidst prognostications like “Power of US must be used more effectively at home and abroad in the next four years or US goes down the drain as great power,” Nixon told his

staff that the basic approach to domestic policy should be that anything old was wrong.<sup>51</sup> Of course, this was no substitute for an actual policy direction and Nixon knew it. During the same month, Nixon announced the creation of a National Goals Research Staff that would “study and report on emerging trends in demography, education, economic growth, environment, technology assessment, and the use of social indicators to identify America’s emerging social needs.”<sup>52</sup> In October he asked his aide Ken Cole to assemble his campaign promises regarding domestic policy in a vain attempt to trace some sort of outline around his promises.<sup>53</sup>

Moynihan continued his earlier theme in a speech given at Hendrix College, Arkansas, April 6 1970 called “The Concept of Public Policy in the 1970’s.” Again it was extensively circulated throughout the higher echelons of the administration and a copy annotated by Nixon sits in the files. In this article Moynihan sees as at least one of the reasons for the social dissatisfaction evidenced by the riots as “the structure of American government and the pragmatic tradition of American politics, [which] has too much defined public policy in forms of program, and in consequence has inhibited the development of true policy.” Moynihan indicated that he received a “very positive response” to the piece and Nixon scrawled his comments in the margins: “Pat – A very perceptive piece - we must proceed in this direction or we will end up with a hodge podge of programs - perpetuated by the bureaucracy + with no central purpose.”<sup>54</sup>

In the spring of 1970, Nixon reorganized existing domestic policy by creating a Domestic Council to be headed by John Ehrlichman. The council took over the task of the National Goals Research Staff which had achieved little and was effectively abandoned soon after its creation (itself an indication of the problems of creating a

philosophy on which policies could be hung). Nixon again pushed for policy direction in the summer of 1970, perhaps spurred on by Moynihan's memo. He asked for a "statement as to what the Administration's general policy is in the domestic field of about 1000 words that will indicate what we are proposing to do by way of messages to Congress and requests for legislation to accomplish our other major objectives of law enforcement, stopping inflation, urban problems and good government, etc."<sup>55</sup> Whereas crime policy might be formulated, the problem was actually that civil rights dominated the domestic policy agenda and that, with no real position on civil rights articulated, the domestic policy of the Nixon administration lacked any real meaning. A young Bryce Harlow aide, Lamar Alexander (later elected Republican Governor of Tennessee, appointed Secretary of Education during the Bush presidency, and, most recently, candidate for Republican nomination for President), stated in a memo in June 1970 that he saw "an immediate problem" in regards to domestic policy: "Remarkably, this Administration lacks a policy toward its biggest domestic program -- race, or, what to do about blacks."<sup>56</sup> John Ehrlichman, who increasingly took over the reigns of domestic policy, stated in August of that year that he wished to "continue the discussion started last meeting of what the Nixon Administration's philosophy of government is and to arrive at some tentative but clearly stated policy proposals." His purpose was to create "a broad domestic policy and program [whereby] decisions could be made and against which existing policies and programs could be evaluated." Ehrlichman fretted that "We are now almost halfway through the first term of this Administration. I think it is appropriate that, in light of our experience so far, we reexamine the basic principles on which we have been operating."<sup>57</sup>

The re-examination was not as much a problem as the formulation of some new philosophy of government or overarching domestic policy. By the end of the year, in a piece reflecting the results of the 1970 congressional elections, in which the Republicans had fared relatively poorly, Nixon could only order that: "We should terminate or diminish as many of the Democratic programs as possible so that we can shift the dollars in to Nixon programs. We need to develop more than rhetoric, we have to make some actual progress in policy development."<sup>58</sup> Whatever other domestic policy formulation had occurred, a positive civil rights policy continued to elude Nixon. At the end of 1971 a Republican oversight committee observed that "...after a period of attention to the mechanics of governing, many in the Nixon Administration were starting to give more time to the substance of policies. In the field of civil rights there has not been a policy or even package of policies under previous Administration nor has one yet developed under President Nixon. Confusing and even contradictory policy statements and actions have been the pattern and practice."<sup>59</sup>

Thus, Nixon had great trouble cutting back programs he had targeted. Nixon expressed his frustration with the bureaucracy when he said of the army, somewhat ruefully: "Only place in the govt where they say 'yes sir' - Everyone else says: 'yes, but -'"<sup>60</sup> The shadow of the Great Society continued to dictate policy during this period.

Nathan observed that Nixon's cabinet members were often led by rather than leading the sections over which they presided:

It soon became clear to new appointees, if it was not already at the outset, that these experts would be needed close at hand to supply the necessary facts about program complexities and to help shape in generic terms the proposals they would want to put forward for Administration approval as new policy initiatives.



Thereafter, in many obvious and subtle ways, the praise and respect of the agency's permanent staff was increasingly made a function of the performance of these presidentially appointed officials as spokesmen and advocates *for* the agency's interests. As if in recognition of this point, John Ehrlichman remarked at a Key Biscayne press briefing late in 1972 that after the administration appointed "key officials to high posts" and they had their picture taken with the President, "We only see them at the annual White House Christmas party; they go off and marry the natives."<sup>61</sup>

Nixon's initial frustrations were focussed on an uncooperative Congress. It had been Congress, after all, that had prevented him from appointing his choices for Supreme Court nominee, that overrode his attempts at revenue sharing, that had attacked even his most innovative programs, such as the Philadelphia Plan and the FAP. Thus, until the election of 1970 indicated the fruitlessness of his efforts, he threw himself into creating a more friendly Congress.

However, even before the off-term elections, plans were made to circumvent Congress by focussing on controlling the bureaucracy. With the creation of the Domestic Council in July 1970, patterned after Kissinger's successful National Security Council, there came a "decided shift in approach. More attention was paid to opportunities to achieve policy aims through administrative action as opposed to legislative change, the former to be accomplished by taking advantage of the wide discretion available to federal officials under many existing laws."<sup>62</sup> Instead of an ambitious legislative agenda Nixon wished to ensure that the bureaucracy would successfully implement existing programs. From the beginning, the relationship of the Nixon White House to the career executives in the various departments was ambivalent. Political scientists Richard Cole and David A. Caputo observed:

On the one hand, the Nixon White House viewed senior career executives as, on the whole, disloyal. On the other hand, the bureaucracy was seen as a possible alternative for achieving at least some of the domestic objectives which Congress

appeared unwilling to approve. Redirecting the basic values and partisan loyalties of the senior levels of bureaucracy became a major focus of the Nixon White House and the major political strategy used to pursue the administration's domestic policies.<sup>63</sup>

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<sup>1</sup> See Stephen E. Ambrose, *Nixon, Volume II: The Triumph of a Politician 1962-1972* (London: Simon and Schuster, 1989), where a painstaking reconstruction of the chronology of the administration is provided but manages to miss the reassessment of racial policies as well as the Philadelphia Plan.

<sup>2</sup> Dan T. Carter, *From George Wallace to Newt Gingrich: Race in the Conservative Counterrevolution, 1963-1994* (London: LSU Press, 1996), 39.

<sup>3</sup> News Summaries - January 1970, Box 31, POF: Annotated News Summaries, NPMP. Safire claimed that "most of the zip went out of the integration effort (the "courageous, if short-lived" Philadelphia Plan) after the hardhats marched in support of Nixon on the war." William Safire, *Before the Fall: An Inside View of the Pre-Watergate White House* (New York: Doubleday and Co., 1975), 585. See also John Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (London: University of Chicago Press, 1996), p211-215. Dan T. Carter's *The Politics of Rage: George Wallace, the Origins of the New Conservatism, and the Transformation of American Politics* (London: Simon and Schuster, 1995) argues persuasively that Wallace scared the Nixon team more than any Democrat. See chapter 12, "The Wars of Richard Nixon," 371-414.

<sup>4</sup> Melvin Small, *The Presidency of Richard Nixon* (Lawrence, KA: Kansas University Press, 1999), 158.

<sup>5</sup> Copy of *Christian Science Monitor* article by Joseph C. Harsch "The Balance Sheet," 12/30/69, President's Handwriting: January 16 thru 31, 1970, Box 5, WHSF: POF: President's Handwriting, NPMP.

<sup>6</sup> Memorandum for the President from Moynihan, November 30 1970, President's Handwriting, December 1970, Box 8, WHSF: POF: President's Handwriting, NPMP.

<sup>7</sup> Memorandum from Moynihan to the President, November 13 1970, President's Handwriting, November 1970, Box 1 (Folder 1) (Boxes 1-13), WHSF: SMOF: POF: Contested Files, NPMP.

<sup>8</sup> The Nixon Administration Civil Rights Report, no date [but other material in the same folder indicates that it was from May 1970], Box 2, [Ex] HU2 Equality - Beginning 4/2/69, WHCF: Subject Files HU [Ex] HU, NPMP.

<sup>9</sup> Memo to John Brown from Bryce Harlow, June 2 1970, Box 2, WHCF: Subject Files HU [Ex] HU, NPMP. John Brown was the staff member charged with conveying Nixon's orders to staff. Other material indicates that Nixon's strategy was to emphasise the positive achievements to circumvent the left wing. See hand-written notes on yellow lined pad, 7/24, H-Notes July - Dec '69 [July - Sept, 1969], Part I, WHSF: SMOF: Haldeman notes, NPMP.

<sup>10</sup> Nixon, *RN*, 436, Graham, *Civil Rights Era*, 345.

<sup>11</sup> Carter, *The Politics of Rage*, 387. Cynics might note that Nixon's interference in the Alabama gubernatorial election at least equalled some of his more publicised crimes surrounding the Watergate debacle but is seldom cited as a stain on his character.

<sup>12</sup> Ambrose, *The Triumph of a Politician*, 124.

<sup>13</sup> Small, *The Presidency of Richard Nixon*, 42.

<sup>14</sup> "Nixon and Blacks: Substance and Symbol," edit., *The New Republic*, (July 18 1970), 7-8, 7.

<sup>15</sup> See Draft reply to Black Caucus Recommendation 2,3 and 4, Economic Security and Economic Development, Federal Assistance to State and Local Government - no date (May 1971 or later)[it should be noted that much of the section of the draft is crossed out in pencil, apparently deemed inappropriate to the final reply], Black Caucus I [1 of 2] [CFOA 463], Box 46, WHCF: SMOF: Leonard Garment, NPMP. For an extensive discussion on the problems, see Memo from Moynihan to the President, May 17 1969, Box 2.

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WHSF: POF: President's Handwriting, NPMP. See also Daniel P. Moynihan, *Maximum Feasible Misunderstanding: Community action in the War on Poverty* (The Free Press; New York, 1969).

<sup>16</sup> H.R. Haldeman, *The Haldeman Diaries* (Sony CD-ROM, 1994), Feb. 28 1970.

<sup>17</sup> It is not clear from the notes exactly who attended or what a "black group" was. Presumably, Moynihan rounded up relevant cabinet members and black members of the administration.

<sup>18</sup> Handwritten Notes 2/28, Folder 1 of 25, Documents from Boxes 1 to 45, H Notes Jan- March '70 [Feb. 21 - March 31, 1970], Part II Box 41, WHSF: SMOF: H. R. Haldeman, Contested Files.

<sup>19</sup> See, for instance, Small, who cites the memo as a "demonstrat[ion] that it [the administration] would not actively pursue civil rights issues." (*The Presidency of Richard Nixon*, 165). Michael Genovese see a shift rightwards on civil rights in late 1970 that married Mitchell's "southern strategy" with "benign neglect." Michael Genovese, *The Nixon Presidency: Power and Politics in Turbulent Times* (London: Greenwood Press, 1990), 82.

<sup>20</sup> Memorandum for the President from Moynihan, January 16 1970, President's Handwriting: January 16 thru 31, 1970, Box 5, WHSF: POF: President's Handwriting, NPMP. The memo was leaked to the *New York Times* the same month.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> Handwritten notes of a meeting held on 6/26, H Notes April - June '70 [May 6 - June 30, 1970] Part II Box 42, WHSF: SMOF: H. R. Haldeman, Contested Files, NPMP.

<sup>24</sup> Memo to Jim Keogh from Ehrlichman, June 26 1969, 105 Closed [desegregation][1 of 2], Box 30, WHSF: SMOF: Ehrlichman, NPMP.

<sup>25</sup> Memo for Mr. Chapin from H. R. Haldeman, July 13 1970, Mtg. with President, Sec. Volpe, P. Flanigan, Dick Moore 7/13/70, Folder 2 of 6 Documents from Boxes 10-30: WHSF: SMOF: Colson, Contested Files, NPMP. Many insist, in light of remarks like these, that Nixon harboured anti-semitic feelings. As Leonard Garment, his Jewish aide, pointed out while not discounting some anti-semitic sentiments, Nixon referred to liberal Jews when making such statements. See Leonard Garment, *Crazy Rhythm: My Journey From Brooklyn, Jazz, and Wall Street to Nixon's White House, Watergate, and Beyond* (New York: Times Books, 1997), 199, 200.

<sup>26</sup> Handwritten notes of telephone conversation with President, June 23 (presumably 1971), Meetings/Phone Conversations with President: CWC's notes - Mtg. With the President [2 of 2], Box 14, WHSF: SMOF: Colson, NPMP.

<sup>27</sup> Handwritten notes of a meeting held on 7/23, H Notes July - September '70 [July - Aug. 6, 1970], Part I Box 42, Folder 1 of 25, Documents from Boxes 1 to 45: WHSF: SMOF: H. R. Haldeman, Contested Files, NPMP.

<sup>28</sup> Graham notes that "We have no evidence that Nixon paid any attention to the Philadelphia Plan after December 1969." Though this is an exaggeration, it is true that Nixon generally ignored the plan once implemented. Hugh Davis Graham, "Richard Nixon and Civil Rights: Explaining and Enigma," *Presidential Studies Quarterly*, Vol. XXVI, No. 1, (Winter 1996), 93-106, 103.

<sup>29</sup> Entry for Monday, April 28, 1969, *The Haldeman Diaries*.

<sup>30</sup> Haldeman recorded: "About Family Assistance Plan, wants to be sure it's killed by Democrats and that we make big play for it, but don't let it pass, can't afford it." *Haldeman Diaries*, Monday, July 13 1970.

<sup>31</sup> Jill Quadagno, *The Color of Welfare* (New York: Oxford University Press, 1994), 109.

<sup>32</sup> Draft reply to Black Caucus Recommendation 2,3 and 4, Economic Security and Economic Development, Federal Assistance to State and Local Government - no date (May 1971 or later), Black Caucus I [1 of 2] [CFOA 463], Box 46, WHCF: SMOF: Garment, NPMP.

<sup>33</sup> Memorandum for Pat Buchanan from Stanley S. Scott, August 31 1973. [FG1-FG 6-11-1/Scott, Stanley S.], Box 5, WHCF: Subject Files: HU (Human Rights), NPMP. There is certainly a debate about how much African-Americans, middle-class or not, really benefited from government action in the 1970s. William Julius Wilson has consistently made the point that the division between middle and working class blacks has surpassed in importance the economic divisions between the races. See William Julius Wilson, *The Declining Significance of Race: Blacks and Changing American Institutions* (Chicago: University of Chicago Press, 1978), *The Truly Disadvantaged: The Inner-City, the Underclass and Public Policy* (Chicago: University of Chicago Press, 1987). Others, like the pessimistic Andrew Hacker, insist that the

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division between the races continues to be the dominant fact of American life – see *Two Nations: Black and White, Separate, Hostile, Unequal* (New York : Scribner's, 1992).

<sup>34</sup> Nijole V. Benokraitis and Joe R. Feagin, *Affirmative Action and Equal Opportunity: Action, Inaction, Reaction* (Boulder, Colorado: Westview Press, 1978), 40.

<sup>35</sup> Benokraitis and Feagin, *Affirmative Action and Equal Opportunity*, 119-120, 156-7. Benokraitis and Feagin are careful to note that a fair amount of the increases in minority graduate enrolment was made up of Asian enrolments.

<sup>36</sup> Safire, *Before the Fall*, 238

<sup>37</sup> United States Department of Health, Education and Welfare, Office of Education, *Equality of Educational Opportunity* (usually known as the Coleman Report), (US Government Printing Office: Washington, DC, 1966), 20.

<sup>38</sup> David J. Armor, "The Evidence on Busing," *The Public Interest*, Number 28, (Summer, 1972), 90-126, 102. See also a copy of a preliminary draft for this article, marked "to be published in the summer issue of *The Public Interest*," Memorandum (plus attachments) for the President from Edward L. Morgan, June 16 1972, President's Handwriting - June 16-30, 1972, Box 17, WHSF: POF: President's Handwriting, NPMP. Armor made the point that the fact uncovered by the Coleman report – that schools appeared to make little impact upon the life chances of African-Americans – was ignored by most liberals.

<sup>39</sup> See memo to the President from Moynihan, November 9 1971, [Integration – Housing and Education], Folder 2: [Box 20], WHSF: SMOF: Ehrlichman, Contested Files, NPMP.

<sup>40</sup> Copy of news report, *Washington Post*, March 13 1972, in file marked Busing - Amendments - Public Reaction to [CFOA 10177], Box 51, WHCF: SMOF: Garment, NPMP.

<sup>41</sup> Memorandum for the President from Richard K. Cook, July 20 1972, President's Handwriting July 16-31 1972, Box 18, WHSF: POF: President's Handwriting, NPMP.

<sup>42</sup> Ambrose, *The Triumph of a Politician*, 125.

<sup>43</sup> John E. Ehrlichman, *Witness to Power: the Nixon Years*, (New York: Simon and Schuster, 1982), 223.

<sup>44</sup> Safire, *Before the Fall*, 480.

<sup>45</sup> John Skrentny, "Affirmative action: Some advice for the pundits," *American Behavioural Scientist*, Vol. 41, No. 7, 876-885, 880.

<sup>46</sup> Nathan, Richard P., *The Plot That Failed: Nixon and the Administrative Presidency* (London: John Wiley and Sons, Inc., 1975), 4.

<sup>47</sup> Daniel Patrick Moynihan, "Policy vs. Program in the '70's," *The Public Interest* No. 20, (Summer 1970), 90-100.

<sup>48</sup> Small, *The Presidency of Richard Nixon*, 41.

<sup>49</sup> Cited in Small, *The Presidency of Richard Nixon*, 42.

<sup>50</sup> Annotated News Summaries Dec. 9-24 1971, Box 37, POF: Annotated News Summaries, NPMP.

<sup>51</sup> Handwritten notes on yellow lined pad, 7/21, H-Notes July - Dec '69 [July - Sept, 1969], Part I, Haldeman Notes, Box 40, WHSF: SMOF: Haldeman Notes, NPMP.

<sup>52</sup> Garment, *Crazy Rhythm*, 175.

<sup>53</sup> Memo to Ken Cole from Arthur Burns, October 9 1969. [Domestic Policy], Box 137, WHSF: SMOF: Haldeman Notes, NPMP.

<sup>54</sup> Memorandum for the President from Moynihan May 8 1970, President's handwriting, May 1970, Box 6, WHSF: POF: President's Handwriting, NPMP.

<sup>55</sup> Memo to Ehrlichman from the President April 10 1969, Alphabetical Subject File, Ehrlichman "Scrapbook" Items [Memoranda from the President][2 of 2], Box 18, WHSF: SMOF: Ehrlichman, NPMP.

<sup>56</sup> Memo to Bryce Harlow from Lamar Alexander, Jun 17 1970 (emphasis original), Box 2, WHCF: Subject Files HU [Ex] HU, NPMP.

<sup>57</sup> Memorandum for the President from Ehrlichman (plus attachments), Aug 26 1970, President's Handwriting August 1970, Box 7, WHSF: POF: President's Handwriting, NPMP. See also Ehrlichman, *Witness to Power*, 217.

<sup>58</sup> Draft Memorandum ("P memo"), Notes on Policy, Box 139, WHSF: SMOF: Haldeman: Alpha Subject Files, NPMP.

<sup>59</sup> Civil Rights Study Paper - Organization for Coordination and Oversight, Draft 1/18/71, Civil Rights - Garment-Nathan Study Committee [CFOA 908], Box 59, WHCF: SMOF: Garment, NPMP.

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<sup>60</sup> Hand-written notes of a meeting held on 4-1-71JDE Notes of Meeting with the President - 1-5-71 to 4-21-71 Box 5, WHSF: SMOF: Ehrlichman, Contested Files, NPMP.

<sup>61</sup> Nathan, *The Plot That Failed*, 34.

<sup>62</sup> Nathan, *The Plot that Failed*, 7.

<sup>63</sup> Richard L. Cole, David A. Caputo, "Presidential Control of the Senior Civil Service: Assessing the Strategies of the Nixon Years," *The American Political Science Review*, Vol. 73, No. 2. (June 1979), 399-413, 301.

## Chapter 9

### NIXON'S PERSONAL COMMITMENT TO AFFIRMATIVE ACTION

Politicians are by nature proud people. You must never question their larger motives or their political instincts. But you must also assume that they are constantly balancing principle against interest and that your best hope for bringing them along is persuading them that supporting your position will enable them to serve both simultaneously.<sup>1</sup>

His role... has been that of a man who had to liquidate, defuse, deflate the exaggerations of the romantic period of American imperialism and American inflation. Inflation of promises, inflation of hopes, the Great Society, American supremacy - all that had to be deflated because it was beyond our power... His role has been to do that. I think on the whole he's done pretty good at it.<sup>2</sup>

Historians attempting to deal the contradictions within Nixon's character tend to see different sides to Nixon. Many see a relatively liberal "Jekyll" Nixon in 1969 being taken over by a darkly conservative "Hyde" later in his first term. William Chafe, a trenchant critic of the Nixon administration and writer of one of the most popular books on the post-1945 era, noted the "dual personality of Nixon."<sup>3</sup> Civil rights lawyer Eleanor Holmes Norton saw "two civil rights Nixons, neither of them particularly principled," though the more liberal one on civil rights apparently died in 1970.<sup>4</sup> Michael Genovese saw a shift rightwards on civil rights in late 1970, one that married Mitchell's "southern strategy" with Nixon aide Daniel Patrick Moynihan's "benign neglect" strategy: "If there were two Nixons on civil rights early in 1969, by late 1970, it was the anti-civil rights side of the Nixon personality that would come to dominate the policy and political agenda."<sup>5</sup> Nixon biographer Tom Wicker related Nixon's actions to what he saw as a "psychic bipolarity" that originated from the dramatic personality and philosophical

differences between his mother and father. Similarly, Nixon speechwriter Ray Price saw a “‘light side,’ considerate, caring, sentimental, generous of spirit, kind, and a ‘dark side,’ mean-spirited, vindictive, angry, ill-tempered.”<sup>6</sup>

A second theme that links assessments of Nixon’s civil rights perspectives sees Nixon as essentially unconcerned about domestic issues, including civil rights. Those hostile to Nixon usually refer to Watergate as the most important (but not the only) indicator of his lack of any real principles. Nixon defender Joan Hoff also speaks of Nixon’s “apprincipled” behaviour.<sup>7</sup> Connected to this theme of Nixon forsaking civil rights once it appeared politically expensive not to do so, is the idea that Nixon lost interest in domestic policies and left others to create domestic policies. Hugh Davis Graham is perhaps the best known exponent of this view. Graham states in an article entitled “The Incoherence of the Civil Rights Policy in the Nixon Administration,” that “no coherent theory of civil rights to govern the new Republican administration’s policy choices” arose. He sees a policy vacuum that was filled with “aggressive men... pursuing their own agendas. The result was a confusing and indeed quite contradictory array of civil rights initiatives and policies.”<sup>8</sup> In many ways, this perspective, in relation to Nixon’s personal beliefs regarding race, is that he had none and did whatever was expedient in terms of votes. Vernon Jordan of the Urban League said of Nixon: “He didn’t care about the basic issue.”<sup>9</sup> James Farmer said of his former boss: “He had no strong feelings on any social issues. He was capable of doing either good or bad with equal facility.”<sup>10</sup>

The “apprincipled” (or unprincipled, depending upon one’s animosity towards Nixon) theme is perhaps the most important consensus about the Nixon

character, one which links the many actions as president. According to this version of events, the lack of principles meant that no moral barriers would get in the way of political goals. Hence, Watergate. Hence, the southern strategy; hence the leftward and rightward “zigs” and “zags” and the criticism from Patrick Buchanan as well as from numerous liberal pundits; and hence the inability of scholars and insiders in the Nixon White House to find coherent themes with which to characterise the Nixon presidency. Nixon thus becomes the archetypal modern political villain, one for whom power is no longer, as it was for Johnson, simply a means to achieve goals, be they noble or ignoble, progressive or simply deluded. Nixon was, as the *New Yorker* put it, the “man to whom nothing mattered except power.”<sup>11</sup>

## The Key

One problem with analyses of Nixon is that they use contemporary moral perspectives to understand an administration that existed at a time of flux in moral and social values. Nixon was, as Gary Wills noted, a post-war man caught up in a time when values were changing.<sup>12</sup> Many perspectives that we hold today were only being created at this time. What was liberal in 1965 may appear conservative today. What is considered the most progressive radical perspective on racial issues today – for instance, maintaining black identity – would have been unpardonably conservative at a time when integration was still the aim. The categories of left and right are not useful tools of analysis when looking at the Nixon presidency because the values characterising American society in the post-war period are hardly recognisable today. Melvin Small observed: “...by looking



at what Nixon accomplished in domestic and economic policy, and not what he said about those issues, one can understand why observers in the year 2000 might label him the last liberal president.”<sup>13</sup> It would be more accurate to call him the last president during a liberal era. Nixon – rightly seen as a conservative at the time of his presidency – may now appear liberal in respect of the present political climate because his accomplishments carried much of the baggage of a more experimental era. Nixon in some ways bridged the two eras and in other ways displayed characteristics of both.

This bridging role becomes clear when examining the history of affirmative action. Attitudes towards quota-based measures changed 180 degrees between the passage of that epitome of post-war liberal measures on civil rights – the 1964 Civil Rights Act – and today. John Skrentny notes that “progressive thinkers in 1967 shared a view with civil rights conservatives of the 1970s, 1980s, and 1990s: that the Civil Rights Act proscribed *only* intentional discrimination, outlawed only hiring practices which intentionally used an individual’s race against him or her.”<sup>14</sup> Though this is undoubtedly true, the demand for a strict reading of the 1964 Civil Rights Act in 1967 came from within an expectation (or at least a hope) of the imminent integration of blacks within the American mainstream, at a time that many still believed that, as historian Kenneth Stampp put it, that blacks were, after all, “only white men with black skins.”<sup>15</sup> The real movement that has taken place since the 1960s has been conservative in its general lowering of aspirations, jettisoning of radical hopes, and narrowing of horizons. It is in this change of context that affirmative action – seen during Nixon’s time as a compromise between radicals wishing for quick integration and conservatives who

wished to maintain social distance between the races – has now come to represent the cutting edge of liberalism.

### The “vision thing”

Reflected in both the aprincipled and the “schizoid” theme is the fact that Nixon appeared to be devoid of any real vision of society, at least in terms of domestic policy. He had neither the liberal optimism of a Kennedy or a Johnson nor the convinced conservatism of a Reagan. Nixon hardly believed in his own programs in relation to African Americans; though he had touted “black capitalism” in the run-up to the 1968 election, he did not believe his own rhetoric. Former Federal Communications Commission (FCC) head and Nixon appointee Dean Burch claimed, “The man didn’t believe in anything. He didn’t believe in a religion or principle or anything. He was totally cynical.”<sup>16</sup> In this sense he was perfectly suited to bring about a policy that can be construed as a last attempt to make the civil rights goals of the 1960s a reality at a time when many questioned the very core of their principles.<sup>17</sup> Nixon – the “pragmatic liberal,”<sup>18</sup> as he called himself, or “the least ideological statesman,” as Pat Buchanan once said of his former boss<sup>19</sup>, was entirely bereft of the optimism of the post-war years about the possibility of racial integration, so obvious in his predecessor, Johnson. Nor was he a “true believer,” as he sneeringly referred to Vice President Spiro Agnew, White House aides Pat Buchanan, Bryce Harlow and others on the right in the correctness of conservative principles.<sup>20</sup> His “aprincipledness” that Hoff and others pointed to allowed him to implement programs that Johnson, despite developing the thesis behind

affirmative action in his famous Howard University speech in 1965, dared not implement himself. No one else was in a better position to “liquidate, defuse, deflate the exaggerations of the romantic period of American imperialism and American inflation,” as Walter Lippmann put it.<sup>21</sup>

However, the pragmatic Nixon was not bereft of principle. Historians have pointed to liberals within the Nixon staff – especially Ehrlichman, Moynihan and Leonard Garment – as largely responsible for what are often seen as progressive moves on civil rights, including affirmative action.<sup>22</sup> This is at least partially true, as is the contention that political gain could be made from dividing the Democrats between civil rights and labor supporters. But there was also a more personal basis to Nixon’s commitment to affirmative action that must be discussed – the right to earn.

To see Nixon’s espousal of affirmative action as a huge contradiction between is to mistake both the meaning of affirmative action and the meaning of the Nixon presidency. Affirmative action began as a conservative measure designed to deal with a racial crisis. At first, its intention was to alleviate conditions within inner-cities. Later, it became an essential tool in stabilising and incorporating sections of the black middle class. Only later, when conservative opposition arose and, more importantly, when strategies attempting integration of schools and housing appeared to fail, did liberals defend affirmative action as the last stand of civil rights. Neither should the Nixon administration’s espousal of affirmative action be seen only as part of a six-year grasp for political power. Though the meaning of affirmative action changed, though the content behind the form altered, Nixon’s espousal of affirmative action as a means of extending the right to earn to blacks was consistent throughout his career. So was his

attack on quotas in 1972; the right of any individual to earn must not be abridged. Nixon reasoned.

## The Nixon Philosophy and Affirmative Action

Confusion surrounds the various accounts of Nixon, either as a man or as a President, when it comes to civil rights. As John Skrentny observed, his civil rights agenda remains a mystery for historians and even those implementing his policies.<sup>23</sup> Even Nixon's closest advisers plead ignorance regarding his true feelings on black Americans. Perhaps the difficulty involved in answering this question is the only maxim upon which virtually all observers - historians, political theorists and those who worked closely with Nixon - agree. As speechwriter Ray Price, who observed Nixon in private as well as public moments, observed, Nixon remains "a paradox wrapped in an enigma inside an incongruity."<sup>24</sup>

Nixon declared in a secret memo to presidential aide John Ehrlichman that his feelings on race "are, if anything, ultra-liberal."<sup>25</sup> He wished to be seen as "a man prepared to everything *practically* possible for the blacks," as Rowland Evans and Robert D. Novak observed.<sup>26</sup> During his tenure as vice-president, he had overseen the administration's efforts in the civil rights field; he had been favoured by civil rights leaders over John F. Kennedy in the 1960 election as the candidate of choice for black Americans before Kennedy made the fateful call to the Birmingham jail where Dr. Martin Luther King was being held. Throughout his presidency, he saw himself as a man prepared to "do what's right" for African-Americans. As biographer Stephen Ambrose

indicated in his even-handed assessment of Nixon, he never appealed directly to the white backlash and privately as well as publicly told GOP candidates that they could never win by outsegregating the Democrats.<sup>27</sup> He told black leader James Farmer, at the time of his resignation as Assistant Secretary of Health, Education and Welfare in December 1970, that he wanted to help blacks. “I care,” Nixon told Farmer, “I just hope people will believe that I *do* care.”<sup>28</sup>

The assessment of Nixon by contemporary observers within the civil rights movement was negative. For them, and for many modern historians, Nixon was a politician of the right, and all analysis of his actions stemmed from that basic fact. “For the first time since Woodrow Wilson,” said the chairman of the board of the NAACP in 1970, “we have a national administration that can be rightly characterised as anti-black.”<sup>29</sup> Roy Wilkins, the executive director of the NAACP, said that Nixon wished to “turn the clock back on everything” and had sided with the “enemies of little black children.”<sup>30</sup> Historians are a little more charitable than contemporary observers, perhaps with subsequent administrations in mind. More sympathetic accounts of Nixon suggest reasons why Nixon got such bad press from civil rights movement figures. Journalists Evans and Novak’s contemporary account suggests that Nixon’s anti-black image might have been because of “his uncomfortable shyness and unwillingness to deal with outsiders, applicable to everybody but very pronounced with Negroes.”<sup>31</sup>

The confusion surrounding Nixon’s stand on civil rights reflects a general confusion in historical and contemporary journalistic accounts about the Nixon personality, one that is relevant to a study of the reasons for the initiation affirmative action during his presidency. Clearly, complex and personal issues – what Bruce Mazlish

in 1972 termed the “Nixon Problem” must be examined.<sup>32</sup> As Mazlish stated, when Nixon was elected in 1968, “friends and foes alike conceded that they did not know who the ‘real’ Nixon was, or how he might be expected to behave.”<sup>33</sup> What were the basic elements of the Nixon personality that might have influenced his feelings on race and racial issues?

Perhaps the only characteristic that might have made Nixon sympathetic to the plight of black Americans was what Len Garment called an “instinctive sympathy for the underdog.”<sup>34</sup> Sudden, deeply felt moments of passion occasionally emerge in the Nixon records, apparently triggered by some event or issue. In response to a news item about a plane crash involving the Wichita, Kansas football team, where insurance companies said they that may not pay claims because the pilots was improperly certified, Nixon wrote, no doubt harking back to his days playing with a small-town, local football team: “Flanigan - Get on this - Don’t let these bastards get out of paying this claim.”<sup>35</sup> On more than one occasion, Nixon told a story that especially affected him about a son, graduating from an Ivy-League college, who is ashamed because his father is not university educated and appears crude. Nixon told his aides that “nothing bothered him more than this because the young man’s education was obtained only because of the hard work of the father.” He added at one meeting where he told the story, “the worst thing you can do to a man is snub him; it’s worse than exploiting or enslaving him.”<sup>36</sup> Here, the president of the United States reveals an earlier version of himself – the young man who attended university when his father could not. It also revealed the continuing sensitivity about the rejection he felt he had experienced from Eastern elite circles. The insecurity borne of rejection both by the best New York law firms and by the FBI after Nixon

graduated from Duke, the alienation he felt from his Eastern Establishment “friends” who led the movement to get Eisenhower to drop him from the Republican ticket in 1952 – all remained with him throughout his life and could have some bearing on his attitudes toward race.

A second, related characteristic was Nixon’s resentment of privilege. Parmet suggests that Nixon’s attachment to the Republican Party may have been related to this hatred of the elite, rather than antipathetic to it: “More than conventional Republican conservatives, however, Nixon kept seeing conflict in terms of a class struggle.”<sup>37</sup> Many accounts analyse the Nixon character in terms of class hatred and resentment against more privileged classes. Virtually all see this as a flaw, as one of many of the undesirable aspects of the man, such as his virulent hatred of the press, were based.<sup>38</sup> It is also possible to see this quality in a positive light, both in energising Nixon’s campaigns and projects and in that it may have lent sympathy to the plight of others. Again, it is possible to see this “negative” characteristic as potentially positive in terms of Nixon’s attitudes towards race.

## The Private Nixon and Race

In assessing the *private* attitudes of a political figure towards a subject as contentious as that of race, the researcher often works with very little evidence. Political figures tend to avoid speaking “off the cuff” about issues like race, especially in periods where the possibility of race riots appears real. Additionally, it is difficult to know whether use of the word “nigger,” for instance, is a careless use of a term that was

accepted when the subject using it grew up or a declaration of the subject's true feelings about African-Americans. Moreover, what evidence there is can often be contradictory. As Myrdal noted: "The moral struggle goes on within people and not only between them... There are no homogenous 'attitudes' behind human behaviour but a mesh of struggling inclinations, interests and ideals, some held conscious and some suppressed for long intervals, but all active in bending behaviour in their direction."<sup>39</sup> With that caveat in mind, it is possible to view Nixon's background as fairly liberal on the issue of race.

Both Nixon himself and friendly biographer Herbert Parmet contend that Nixon inherited a moral position as regards to civil rights from his Quaker upbringing: "His Quaker background was notably free of such [racial] bias, and nothing in the record contradicts that history for either the man's public or personal life." Larry Hood saw Nixon's experience at Duke University, where he experienced a Jim Crow society firsthand, as important in making him a committed racial liberal.<sup>40</sup> Nixon himself cited reasons for his self-professed racial liberalism as his "background -- background of my college education, Quaker school, and the like."<sup>41</sup> As early as 1946, before the Hiss affair, the Douglas campaign and before Truman's overwhelming interest in either subject began, Nixon stated that "We must be vigilant against the doctrines of the Bilbos and the Talmadges and the Gerald L.K. Smiths, who are just as dangerous to the preservation of the American way of life on the one hand as are the Communists on the other."<sup>42</sup> If we are to accept Myrdal's rank order of discrimination, Nixon could have counted himself as among the most liberal of parents in the 1950s. When in Washington, Nixon sent his daughters to Horace Mann, a public integrated school, and later to Sidwell Friends School, an enlightened Quaker institution that had no racial or religious



barriers.<sup>43</sup> It is likely that he was more predisposed towards liberal attitudes on civil rights than many of his compatriots. But he was more than ready to jettison his Quaker attitudes, as his participation in WWII demonstrates. Yet he spoke up and down the country on the issue with an energy that suggested a real belief in what he was saying. A new faith of anticommunism rather than the old faith of Quakerism spurred Nixon toward rhetorical racial liberalism in the 1950s. He touched on the theme of anticommunism in nearly every speech he made about race and civil rights. In a transcript of a radio/television speech the then-vice president made in 1953, the way in which Nixon viewed the problem is evident:

Every act of racial discrimination or prejudice in the United States hurts America as much as an espionage agent who turns over a weapon to a foreign enemy.

Every American citizen can contribute toward creating a better understanding of American ideals abroad by practising and thinking tolerance and respect for human rights every day of the year.<sup>44</sup>

In virtually all speeches on civil rights, whatever the audience, Nixon repeats this theme. In some cases it was subsumed but was always present. At a rally in Harlem in 1956, the vice-president stated that:

During the next four years there is no single issue which will be more important than civil rights. We must *lead the way* in providing equality of opportunity for all of our people regardless of race, religion, color or national origin. This is not a matter of charity or of politics -- it must be done because of what it means to our economic strength here at home: *what it means to our standing throughout the world*: and most important of all because, under our concept of government and religion, it is the right and moral thing to do.[emphasis added]<sup>45</sup>

He warned listeners in Chicago in 1956 of the danger of the race issue for American prestige abroad: "I can state from my experience in travelling around the world that every incident of race hatred is blown up a thousand-fold and hurts us irreparably

abroad.”<sup>46</sup> Again, in 1957, he emphasised that discrimination was a liability because “(e)very time there is an instance of discrimination in the United States, it gives the Communists a weapon which they can use against us.”<sup>47</sup>

Whatever the basis of Nixon’s racial liberalism, he could count himself as an activist in a period with few white civil rights advocates. He was a life member of the NAACP and had been thanked personally by Martin Luther King for his efforts in passing the 1957 Civil Rights Act. Nixon voted for anti-poll tax bill in 1947 and 1948.<sup>48</sup> He served as chair of the Committee on Government Contracts while Vice President. Nixon had an awareness, at least, of some of the barriers facing black Americans in the workplace. As Joan Hoff has pointed out, Nixon’s activities in the 1950s appeared to set a course in the direction of his later espousal of affirmative action.<sup>49</sup> In the Committee on Government Contracts’ last report, entitled *Pattern for Progress*, its first point about racial discrimination could be said to outline “institutional racism,” most famously discussed in Carmichael and Hamilton’s *Black Power*:<sup>50</sup>

Overt discrimination, in the sense that an employer actually refuses to hire solely because of race, religion, color, or national origin is not as prevalent as is generally believed. To a greater degree, **the indifference of employers to establishing a positive policy** of nondiscrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality.<sup>51</sup>

Under “recommendations,” the Committee called for the extension of the principle of equal opportunity to grant-in-aid programs with particular reference to those involving education, training, recruitment or referral, to programs where Federal subsidies were involved in housing and to agreements whereby the Federal Government contributed monies to state and local programs.<sup>52</sup> Though it is possible that Nixon’s position on the Committee was more titular than real and that he had little to do with this

effort (especially given its appearance in 1960 – a busy year for Nixon), these ideas had already been aired by Nixon himself earlier. In a 1955 radio broadcast he described employment discrimination as “like an iceberg; only a small part of it is visible.” In the same broadcast Nixon signalled that non-discrimination was voluntary only in the sense that contractors voluntarily signed contracts with nondiscrimination clauses.<sup>53</sup> In 1957, as previously noted, Nixon wrote to the head of each Government contracting agency asking him to adopt a firmer approach in the compliance work.

Critics might point out that though strong words were spoken, few actions took place. *Patterns for Progress* defensively pointed out that “(m)any of these milestones have gone relatively unnoticed by the general public because of the policy of releasing no publicity on individual complaints or government contractors.” The truth was that many of the “milestones” were not significant enough to be noticed by the public. Their “achievements” included many talks with contractors, conducting surveys, many meetings, the making of promotional films, pamphlets and leaflets and setting up offices. Nixon’s apparent liberalism on civil rights issues did not necessarily imply that he thought that blacks were equal. He defended colonialism, for example, when speaking before the “English-speaking Union of the Commonwealth” in 1958.<sup>54</sup>

Whatever Nixon’s innermost principles on the issue of race might have been, Nixon remained a true believer in anti-communism. Through it he expressed his loyalty to the post-war set-up, to the status quo. Anti-communism was, after all, the force that had enabled him to achieve national political prominence and retained a personal meaning for him throughout his life.<sup>55</sup> It took on a near-religious importance, as he stated

decades later: “Anti-communism is not a policy. It is a faith - faith in freedom.”<sup>56</sup> This belief in his country – expressed as anti-communism – fuelled an early racial liberalism.

Whatever reputation Nixon had for racial liberalism, it disappeared from the public eye when Nixon famously refused to intervene when Martin Luther King was jailed in 1960. Instead, Kennedy’s telephone message of sympathy helped secure black votes. Between 1960 and his election in 1968, little in the way of records that might contain some insight into Richard Nixon’s feelings about race have been released. In 1964 Nixon avoided comment on the 1964 Civil Rights Act, perhaps in deference to the leadership of Barry Goldwater. However, he consistently warned Republicans away from racial politics. In speeches after Johnson’s election he warned Republicans not to mine the “fool’s gold” of racism.<sup>57</sup> In public, he consistently favoured equality for black Americans.

### Nixon the racist?

An oft-repeated accusation regarding race was first aired by his aide John Ehrlichman in his memoirs of the Nixon years. Ehrlichman remembered:

Twice, in explaining all this to me, Nixon said he believed America’s blacks could only marginally benefit from Federal programs because blacks were *genetically inferior* to whites... Blacks could never achieve parity... but, he said, we should still do what we could for them, within reasonable limits, because it was the “right” thing to do.<sup>58</sup>

Questions over the accuracy of Ehrlichman’s memory have created something of a controversy amongst historians. As Joan Hoff pointed out, the Nixon administration “will be the best-documented in US history,” given the extensive

recording, note-taking and general documenting of the administration's everyday activities.<sup>59</sup> It seems reasonable that within these voluminous records, it is possible to find some documentation supporting Ehrlichman's claim, despite the "off-the-record" nature of the comments. However, no one has yet found any mention in the documents released by the Nixon Presidential Materials Project (NPMP) to back up Ehrlichman's memory of the phrase "genetically inferior." It is possible, of course, that Nixon explicitly told Ehrlichman to keep these comments off the record or that any recording of them has been deemed to be harming a living person and has thus been withdrawn from the Nixon Presidential Materials Project, the guardian of the Nixon papers and arbiter of what is public and what is private amongst the Nixon papers.

However, there is enough evidence now to suggest that Nixon did indeed believe, at one time or another, that blacks were inferior. Nixon's other right-hand man, H. R. Haldeman, published his daily diaries of life in the Nixon White House. The entry for Monday, April 28 1969 seems to back up Ehrlichman's recollections. In it Nixon claims that the "whole problem" of welfare was "really the blacks." Nixon ruminated that "there has never in history been an adequate black nation, and they are the only race of which this is true". "Africa is hopeless", he claimed, "the worst there, is Liberia, which we built".<sup>60</sup> Joan Hoff called the Haldeman diaries into question after their publication, doubting especially the ethnic slurs that Haldeman claimed Nixon used.<sup>61</sup> The entry in question, however, has an almost exact match in Haldeman's hand written meeting notes for the same day. Haldeman's hand written notes on yellow lined pad dated 4/28 read: "re Welfare - have to face fact its black - not poor, devise system that recognizes this that

appears not to. Get out of veil of hypocrisy and guilt. Never been an adequate black nation. Africa is hopeless.”<sup>62</sup>

These ideas appear anything but liberal. There is further evidence that Nixon did not regard blacks as equals. Perhaps the most revealing document was written by Daniel Patrick Moynihan, Nixon’s aide and chief adviser on racial problems, in November 1971, after he had been appointed as US Ambassador to the United Nations. Moynihan responded to a request clearly made by Nixon for thoughts on an article in *The Atlantic Magazine* by Richard Herrnstein entitled “I.Q.” Released in October 1996 after originally being withdrawn by the Nixon Presidential Materials Project, this document shows that Nixon brought the subject of black inferiority up at a cabinet meeting when discussing the infamous article by Arthur Jensen published in the *Harvard Education Review*. Jensen claimed that the differences between black and white IQ test scores were more likely to be heritable rather than environmental. Though the memo was written by Moynihan, it reflects the interest Nixon took in the subject and contains many sections that were underlined or marked by Nixon. Additionally, Moynihan’s flattering style and his ability to pose an argument to Nixon as if Nixon had made it in the first place give some clues as to Nixon’s feelings on the subject. Certainly, the contents of this memo weigh in on the side of Ehrlichman’s recollections.

Moynihan had carried on correspondence with Arthur Jensen after he published the article in *The Harvard Educational Review*. Moynihan wrote to Jensen that hereditary differences “might be one” of the reasons for a disparity between male and female professional and managerial workers, among other things. However, in general, Moynihan disagreed with most of Jensen’s contentions, less because he was sure that

they were wrong than from the certainty that, if he were right, social programs to help blacks were useless.<sup>63</sup>

The most remarkable aspect of Moynihan's response is that he tacitly admitted that Herrnstein was right. Though he at no point agrees with either author, Moynihan evidently felt less than confident that these ideas could be successfully refuted. He insisted that the subject was kept under wraps and that government must proceed with programs designed to disprove Jensen whether they were correct or not. Nixon marked certain passages, among which was Moynihan's plea for silence:

Frankly, I don't see how a society such as ours can live with this knowledge. Scientists can live with it: have done so. But how can it be public as against private knowledge? ...These are not the works of redneck preachers interpreting the Old Testament. The authors are liberal men of science... But it is also clear that the findings Herrnstein summarizes provide a formidable argument against charges of discrimination in cases where individuals are selected on the basis of objective measurements of intelligence. At a yet nastier level persons opposed to school integration can certainly find ammunition in this material. Doubtless someone will soon discover -- what has been in the literature since 1915 -- that prisons are disproportionately filled with persons of low or retarded intelligence, and use this information for assorted ugly purposes. I need not go on: the "danger" of this knowledge is self-evident.<sup>64</sup>

Moynihan outlined to Nixon that "a primary problem is how to deal with the widespread legal and social expectation of equality of outcomes with respect to socially defined groups, primarily racial, ethnic and religious groups." In the Howard University speech, which Moynihan had helped to draft, President Johnson said equal results should follow equal opportunity. "Now we are told by scientists that it can't be had." Moynihan continued his plea: "It seems to me essential for you to proceed on the assumption that the scientists have not proved their case."<sup>65</sup>

There is no doubt that this memo was as much designed to flatter Nixon (as nearly all of Moynihan's were) as to convey an important message. Nevertheless,

taken in its entirety, it gives a snapshot of private attitudes towards racial issues in the Executive in 1971. Moynihan, on the liberal side of racial questions in the Nixon cabinet, felt he had no defence against the arguments of Herrnstein and Jensen. There was a suspicion, if not a fear, implicit in Moynihan's memo that the implications of the failure of social programs were that blacks may not have been equal to whites. The major decision, one that Nixon, in asking for the comments, must have been considering, was whether to explore further the possibility of challenging the views of Jensen and Herrnstein by adopting programs that attempted to solve the question of racial inequality or whether simply to attempt to "contain" racial issues. Moynihan put the case very squarely for the latter: "The duty of government is to do everything it can to minimize that component of inequality which results from environment."<sup>66</sup> The duty of government, at least in the eyes of the White House, had perceptibly shifted from Johnson's liberal goal of black equality to simply stabilise the situation – *sotto voce*. It might be said that racial reform gave way to race relations.

In an earlier memo, Moynihan had been giving advice about crime. He expressed his opinion about the difficulty that Nixon, having drawn attention to crime in the election campaign and since, would face when subsequent programs failed to have an effect on statistics. The advice, which Nixon underlined and marked beside it, "Correct," would have been apposite for race relations: "What you can't control, you had better not draw attention to."<sup>67</sup>

The most important implication of the Moynihan memo – if it is accepted that its sentiments broadly reflected Nixon's on the issue – is that Nixon held no particular views on race apart from the fact that it was a troublesome problem in the



United States, that it threatened *disorder*. Nixon maintained an open mind on the scientific and moral question of black inequality. The evidence shows at the very least an equivocal approach by Nixon to questions of black and white equality. At times, it seems, Nixon thought that blacks and whites would eventually integrate. When discussing who might fill Supreme Court vacancies, he had originally favoured Jewish Republican Rita Hauser, a longtime Nixon supporter. But then he saw an article which quoted her as seeing no Constitutional impediment to same-sex marriages. Nixon said: “There goes a Supreme Court Justice! I can’t go *that* far; that’s the year 2000! Negroes [and whites], okay. But *that’s* too far!” Other memos suggest that he saw limits to the ability of American society to overcome racism. Commenting on a piece by Charles F. Palmer, President of the National Student Association in which he promised that, unless the problems of the “repression of black, brown and red people,” poverty, the Vietnam war, the environment, women’s and workers’ rights were resolved, students would continue to protest. Nixon underlined a sentence – “until these things have changed” and wrote: “1. They are being changed, 2. Except for V. Nam, none will ever be solved.”<sup>68</sup> The fact that Nixon sought the opinion of Moynihan, one of his more thoughtful advisors, on racial issues indicates at least an interest in the subject.

However, the issue of racial equality was, to Nixon, outside the most important concerns of his presidency – except in its ability to destabilize the country. He clearly had no core beliefs or convictions on the subject. The actual scientific issue of whether or not black Americans could ever be equal, though of interest to him, was not one where he had to hold a consistent view. Though Nixon used the expression “doing what’s right” in regard to civil rights many times, for him it meant doing whatever was

needed to maintain stability, whatever would fulfil his “obligation not to have the Goddamn country blow up” as he succinctly put it in one meeting.<sup>69</sup> In other words, Nixon may have been “apprincipled” on the issue of race and thus interested only in a detached way about the issue of whether some biological inferiority prevented blacks from achieving equality.

### The Right to Earn and Affirmative Action

Many observers miss the most important principle governing the decisions of the “apprincipled” Nixon, especially in regard to affirmative action. The positive side of the anticommunism to which Nixon subscribed so fervently was the belief that American capitalism remained the best, most fair system in the world. He passionately believed that, as he put it in his famous “Bridges to Human Dignity” radio address in 1968, “there is no greater bridge to human dignity than the pride that comes with well-earned success in the free enterprise system.”<sup>70</sup> “A good job is as basic and important a civil right as a good education,” Nixon told readers in his autobiography *RN*.<sup>71</sup> In the last of his autobiographies, *In the Arena*, published in 1990, Nixon repeated his idea that “(t)he mainspring of capitalism is the rewarding of work and efficiency.”<sup>72</sup> The subject of this belief in the rewarding of work and efficiency was the mirror image of Nixon himself – of humble roots but, through hard work, an achiever who “paid his dues” and *earned* success. Though an intelligent man, Nixon never subjected this idea to any real scrutiny and it becomes clear that this belief was a simple faith borne of his own experience rather than an intellectual understanding of the relationship of dissident Protestant sects to

capitalist ideology. He proudly recounted being told that he had what it took to learn the law – “an iron butt.”<sup>73</sup> His book, *Six Crises*, published after his defeat by Kennedy in the election of 1960, told of the struggles during his political career.<sup>74</sup> “Nothing of any value, in business, in culture, in politics, in sports, or in any other field, was created without struggle,” he lectured more recently. “Struggle is what makes us human instead of animals.”<sup>75</sup> Equally, Nixon believed that nothing could come from nothing. Wills described the strength of this feeling within Americans – none more so than Nixon – in the 1960s: “A total disorientation comes over the American, a vertiginous fear that the law of moral gravity has been rescinded, when he thinks that someone might actually be getting something for nothing.”<sup>76</sup>

Nixon never counted himself as a laissez-faire Republican. In 1984 he told an interviewer: “I was basically for small business. I was never for big business. My source of strength was more Main Street than Wall Street.”<sup>77</sup> William Costello, who published one of the first biographies of Nixon, made the same point a quarter of a century earlier: “The operational Nixon leaned toward accommodation with traditionalism and fiscal conservatism. He retained a Horatio Alger Republicanism more reminiscent of some of the family’s progressivism, or even populism.”<sup>78</sup> He continued his commitment to this ideal throughout (and after, if it could be said to have ended before his death) his political career.

This right to earn, or work ethic, was, of course, not exclusive to Nixon – it found a resonance amongst many at the time. It can be seen as a defensive response to the pervasive questioning of American capitalist values occurring at the time, championing the American Dream. Gunnar Myrdal wrote in 1961 that work was “the

basis for self-respect and a dignified life.”<sup>79</sup> However, Nixon’s fervent espousal of the right to earn is important for several reasons. First, it contradicts the received historical wisdom of the “apprincipled” Nixon. Second, the fact that Nixon included black Americans within his moral vision of a just society is evidenced by his real efforts to extend to them the right to earn, indicating that he at least held out hope that blacks might become equal. He was consistent in wishing to extend the right to earn to black Americans. Indeed, he saw lack of the right to earn as the major problem affecting black Americans. In 1956, Nixon told a rally in Harlem: “But in order to *have* human rights, people need property rights - and never has this been more true than in the case of the Negro today.”<sup>80</sup> In the 1968 campaign, Nixon referred to “(t)he forgotten Americans, the hard-working, the tax-paying Americans, [who] are black as well as white...”<sup>81</sup> His election pitch to black Americans was often cited:

Black extremists are guaranteed headlines when they shout “burn” or “get a gun.” But much of the black militant talk these days is actually in terms far closer to the doctrines of free enterprise than those of the welfarist 30’s - terms of “pride,” “ownership,” “private enterprise,” “capital,” “self-assurance,” “self-respect” - the same qualities, the same characteristics, the same ideals, the same methods, for two centuries have been at the heart of American success... What most militants are asking for is not separation, but to be included in - not as supplicants, but as owners, as entrepreneurs - to have a share of the wealth and a piece of the action.<sup>82</sup>

As Ambrose notes, Nixon’s black capitalism idea “implied a willingness to put aside the goal of an integrated society to concentrate on improving conditions in the ghettos.”<sup>83</sup> Cynics might object that this was simply the political Nixon attempting to divide what had been solidly Democratic constituencies. It is certainly true that, if this was the aim, it patently failed. Nixon was forced to back away from his espousal of “black capitalism” after the concept was attacked right across the political spectrum.<sup>84</sup>

However, as indicated above, Nixon's commitment to keeping the program going outlasted the furore about black capitalism. That Nixon was a "true believer" in the right to earn is demonstrated by his willingness to countenance such a radical program as the Family Assistance Plan (FAP). Though he had effectively given up on it by July 1970, he had resisted opposition from conservatives (and liberals) both inside and outside of the administration to jettison the plan for its radical nature.<sup>85</sup>

More importantly for this discussion, the right to earn served as Nixon's overarching justification for all of the affirmative action programs discussed above. His statement to Congress defending the Philadelphia Plan in 1969 made it abundantly clear that it was this right to which he referred. Affirmative action first became important to Nixon as it afforded the opportunity to earn to black Americans:

The civil rights to which this administration is committed is one of demonstrable deeds – focussed where they count. One of the things that counts most is earning power. Nothing is more unfair than that the same Americans who pay taxes should by any pattern of discriminatory practices be deprived of an equal opportunity to work on Federal construction contracts.<sup>86</sup>

He told speechwriter William Safire "That's why we have to hit this minority enterprise thing so hard - sure they laugh at it - but better jobs, better housing, that's the only way Negroes are going to be able to move to Scarsdale."<sup>87</sup> Nixon, it might be added, has a one hundred percent record – both in 1969 and 1972 – of defending affirmative action programs when they faced real challenges. His famous attack on quotas implied for many that Nixon was rescinding his support of affirmative action.<sup>88</sup> Phillip Hoffman, President of the American Jewish Committee, wrote to both candidates in the run-up to the 1972 election asking what they thought of quotas. The President wrote back on August 11 1972 declaring:

With respect to these affirmative action programs, I agree that numerical goals, although an important and useful tool to measure progress which remedies the effect of past discrimination, must not be allowed to be applied in such a fashion as to, in fact, result in the imposition of quotas, nor should they be predicated upon or directed towards a concept of proportional representation.

I have asked the appropriate departmental heads to review their policies to ensure conformance with these views.<sup>89</sup>

There was no necessary contradiction at that stage between this perspective and his espousal of various affirmative action programs. He was simply asserting the “right to earn” he thought affirmative action afforded to black Americans for whites, too. It was not until some years later that the two appeared inextricably opposed, a subject dealt with in the last section.

One last interesting aspect of Nixon’s personal philosophy merits attention here. His departure from what had been before the Depression traditional Republican individualist laissez-faire values (and what under Reagan again became Republican values) is evident in his renegotiation of the concept of “rights,” perhaps underlining the fluidity of political conceptions at this time. Thus Nixon espoused group rights over individual rights. In another radio speech, Nixon enunciated the changes that he envisioned for rights:

Lincoln freed the slaves. Our uncompleted task is to free the Negro. Franklin Roosevelt promulgated the old, negative freedoms *from*. Our uncompleted task is to make real the new positive freedoms *to*.<sup>90</sup>

In February 1968, Nixon explained a perspective rendered no less than remarkable given the parallels with Johnson’s Howard University speech:

Its time to move on to a new freedom. The old negative freedoms -- freedom from hunger, freedom from want, freedom from fear -- are no longer enough. The new freedom has to mean freedom for the poor as well as the rich, freedom for black as well as for white; and it has to mean not only freedom from but freedom to. It means freedom to grow, freedom to choose, freedom to travel, freedom to create,

recording, note-taking and general documenting of the administration's everyday activities.<sup>59</sup> It seems reasonable that within these voluminous records, it is possible to find some documentation supporting Ehrlichman's claim, despite the "off-the-record" nature of the comments. However, no one has yet found any mention in the documents released by the Nixon Presidential Materials Project (NPMP) to back up Ehrlichman's memory of the phrase "genetically inferior." It is possible, of course, that Nixon explicitly told Ehrlichman to keep these comments off the record or that any recording of them has been deemed to be harming a living person and has thus been withdrawn from the Nixon Presidential Materials Project, the guardian of the Nixon papers and arbiter of what is public and what is private amongst the Nixon papers.

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- <sup>1</sup> Richard Nixon, *In the Arena: A Memory of Victory, Defeat and Renewal* (New York: Pocket Books, 1990), 335.
- <sup>2</sup> Walter Lippmann, writing in the *Washington Post*, cited in News summaries, March 26 1973, March 1973, Box 47, POF: Annotated News Summaries, NPMP. Nixon wrote in the margin beside this item, “a wise observation.” See also Ray Price, *With Nixon* (New York: Viking, 1977), 66/67, Stephen Ambrose, *Nixon, Volume II: The Triumph of a Politician 1962-1972* (London: Simon and Schuster, 1989), 251.
- <sup>3</sup> William H Chafe, *The Unfinished Journey: America Since World War II* (New York: Oxford University Press, 1986), 427.
- <sup>4</sup> Eleanor Holmes Norton, “Civil Rights: Working Backwards” in Alan Gartner et al, *What Nixon is Doing to Us* (New York: Harper and Row, 1973), 201-215, 204. Much material that emerged concerning Nixon’s psychological make-up also pursues this theme.
- <sup>5</sup> Michael Genovese, *The Nixon Presidency: Power and Politics in Turbulent Times* (London: Greenwood Press, 1990), 83.
- <sup>6</sup> Price, *With Nixon*, 29.
- <sup>7</sup> Hoff makes the distinction between “unprincipled” behaviour, where one breaks one’s own principles, to “apprincipled” behaviour: “In contrast, the *apprincipled* person, seldom reforms his behaviour or expresses remorse for transgressions against societal norms because there is no conscious admission of wrongdoing - no apparent awareness of conventional moral or ethical standards. It is this description I have in mind when I refer to Nixon as being aprincipled.” See Joan Hoff, *Nixon Reconsidered* (New York: Basic Books, 1994), 3.
- <sup>8</sup> Hugh Davis Graham, “The Incoherence of the Civil Rights Policy in the Nixon Administration” in Leon Friedman and William F. Levantrosser, ed., *Richard M. Nixon: Politician, President, Administrator* (New York: Greenwood Press, 1991), 159-172, 165, 166.
- <sup>9</sup> Nicholas Lemann, *The Promised Land: The Great Black Migration and How it Changed America* (London: Macmillan, 1991), 203.
- <sup>14</sup> Lemann, *The Promised Land*, 203.
- <sup>11</sup> Cited on the cover of Ambrose, *The Triumph of a Politician*.
- <sup>12</sup> cited in Herbert S. Parmet, *Richard Nixon and His America* (London: Little, Brown and Company, 1990), 19.
- <sup>13</sup> Melvin Small, *The Presidency of Richard Nixon* (Lawrence, KA: Kansas University Press, 1999), 214.
- <sup>14</sup> Skrentny, *The Ironies of Affirmative Action*, 95.
- <sup>15</sup> Kenneth Stampp, *The Peculiar Institution*, (Alfred A. Knopf: New York, 1956), vii.
- <sup>16</sup> Cited in Small, *The Presidency of Richard Nixon*, 310.
- <sup>17</sup> Garry Wills, in his maverick yet brilliant discussion of Nixon, observed this crushing loss of faith in many Americans in 1968: “And their *grounds* for faith have, through the years, evanesced. All their religions are empty - beginning with the religion of religion. After that, the religion of progress (civilization had bombed our cities senseless). The religion of success (*they* had succeeded, and had ashes in their mouths). The religion of prosperity (for America has had a spirituality of materialism, with millionairesaints now losing their faith). Finally, the last great belief, education.” Garry Wills, *Nixon Agonistes: The Crisis of the Self Made Man* (Boston, MA: Houghton Mifflin Company, 1970), 53.
- <sup>18</sup> Nixon stood for election in 1946 on a platform of “pragmatic liberalism,” opposing it to New Deal liberalism. See Parmet, *Richard Nixon and His America*, 22.
- <sup>19</sup> Cited in Parmet, *Richard Nixon and His America*, 58.
- <sup>20</sup> In Haldeman’s hand-written notes on a yellow lined pad dated 5 September 1969, Nixon contrasted “pragmatists” like himself with “true believers.” “We’ve got to play the lib. Govs - even tho Agnew doesn’t like them, build up relations - both NR and RR (?) to get both sides... Agnew play the conservatives - but remember they’re believers - only for us on principle - not pragmatic.” H-Notes July - Dec ‘69 [July - Sept, 1969] Part I, Haldeman Notes, Box 40, WHSF: SMOF: Haldeman, NPMP.
- <sup>21</sup> Cited in Price, *With Nixon*, 66/67, Ambrose, *The Triumph of a Politician*, 251.



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- <sup>22</sup> Joan Hoff, for instance, claims that “Ehrlichman and Garment were instrumental in the formulation of both his civil rights and his Native American policies.” (Hoff, *Nixon Reconsidered*, 56). Graham makes the same implication when he claims that “aggressive men... pursuing their own agendas” were responsible for such reforms as affirmative action. (“The Incoherence Of The Civil Rights Policy Of The Nixon Administration,” 165.)
- <sup>23</sup> Skrentny, *The Ironies of Affirmative Action*, 178.
- <sup>24</sup> Price, *With Nixon*, 18. 178.
- <sup>25</sup> Memo from President to Ehrlichman, Jan 28, 1972[Integration - Housing and Education] Eyes Only; Folder 2 of 5 [Boxes 16-22], WHSF: SMOF: Ehrlichman, Contested Files, NPMP. Nixon also cited this document in *RN: The Memoirs of Richard Nixon* (New York: Grosset and Dunlap, 1978), 443, 444.
- <sup>26</sup> Rowland Evans and Robert D. Novak, *Nixon in the White House* (London: Davis-Poynter, 1972), 134.
- <sup>27</sup> Ambrose, *The Triumph of a Politician*, 89.
- <sup>28</sup> Cited in Evans and Novak, *Nixon in the White House*, 134. Martin Luther King apparently told Earl Mazo that Nixon would have made “positive stand[s] on the question of civil rights.” Herbert S. Parmet stated of Nixon’s vice presidential years that “it would do a gross injustice to deny Nixon’s intellectual and spiritual commitment to racial equality.” See *Richard Nixon and his America*, 268, 269.
- <sup>29</sup> Cited in Chafe, *The Unfinished Journey*, 253.
- <sup>30</sup> Cited in Parmet, *Richard Nixon and His America*, 597.
- <sup>31</sup> Cited in Genovese, *The Nixon Presidency*, 82, Evans and Novak, *Nixon in the White House*, 135
- <sup>32</sup> Bruce Mazlish, *In Search of Nixon: A Psychohistorical Inquiry* (London: Basic Books, Inc., 1972). Chapter 1 is entitled “The Nixon Problem.” Mazlish’s account remains one of the more interesting and balanced “psychohistorical” treatments of Nixon.
- <sup>33</sup> Mazlish, *In Search of Nixon*, 3.
- <sup>34</sup> From an interview conducted by the author May 15 1997.
- <sup>35</sup> News Summaries (no date), News Summaries - October 1970, Box 31, WHSF: SMOF: POF, Contested Files, NPMP.
- <sup>36</sup> Memorandum for the President’s file, July 26 1971 – Subject: Meeting with Nixon, Ehrlichman, Connally, Shultz, and Colson, White House/Strategy Memos, Box 14, WHSF: SMOF: Colson.
- <sup>37</sup> Parmet, *Richard Nixon and His America*, 189.
- <sup>38</sup> The clearest example of this is Garry Wills’ often sneering prose concerning Nixon’s lack of sophistication contained within *Nixon Agonistes*. But nearly all of the psycho-profiles of Nixon traced his “chippiness” or resentment against upper classes from his earlier years along and inexorable path to the excesses of Watergate. See Dr. Eli S. Chesen’s *President Nixon’s Psychiatric Profile: A Psychodynamic-Genetic Interpretation*, (New York, P. H. Wyden, 1973), Dr. David Abrahamsen’s *Nixon vs. Nixon* (New York: Farrar, Strauss and Giroux, 1977), Mazlish’s *In Search of Nixon*, Fawn M. Brodie, *Richard Nixon: The Shaping of His Character* (London: W.W. Norton & Company, 1981). All mention this feature of Nixon’s personality as a flaw.
- <sup>39</sup> Gunnar Myrdal, *An American Dilemma: The Negro Problem and American Democracy*, (Harper & Brothers Publishers: New York, 1944), xlv.
- <sup>40</sup> J. Larry Hood, “The Nixon Administration and the Revised Philadelphia Plan for Affirmative Action: A Study in Expanding Presidential Power and Divided Government” *Presidential Studies Quarterly* 23 (1993), 145-67.
- <sup>41</sup> *Congressional Quarterly: The Public Records of Richard M. Nixon and Henry Cabot Lodge*, article contained in file marked “Congressional Quarterly,” Box 17, RNC records.
- <sup>42</sup> Speech given at East Whittier Friends Church, October 8 1946, *Statements Made By the Vice President Concerning Civil Rights in the Early Part of His Public Career*, Speeches, 1957, Box 17, RNC records.
- <sup>43</sup> Parmet, *Richard Nixon and His America*, 268.
- <sup>44</sup> Transcript of a Radio-TV speech to the American public, Dec. 23, 1953, Speeches 1953, Box 17, RNC records.
- <sup>45</sup> Excerpts from address of Vice President Richard M. Nixon to a rally in Harlem, New York Oct 31 1956, Speeches 1956, Box 17, RNC records.
- <sup>46</sup> Excerpts from remarks of Vice President Richard M. Nixon at the Trianon Ballroom, Chicago, Oct 25 1956, Speeches 1956, Box 17, RNC Records.

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<sup>47</sup> Statements Made By The Vice President Concerning Civil Rights In The Early Part Of His Public Career, Speeches 1957, Box 17, RNC Records.

<sup>48</sup> *Ibid*.

<sup>49</sup> Joan Hoff, *Nixon Reconsidered*, 48.

<sup>50</sup> Stokely Carmichael & Charles V. Hamilton, *Black Power: The Politics of Liberation in America* (New York: Random House, 1967).

<sup>51</sup> *Pattern for Progress: Final Report to President Eisenhower from the Committee on Government Contracts* (Washington DC: GPO, 1960), 14.

<sup>52</sup> *Ibid*, 14, 15.

<sup>53</sup> "NIXON BROADCASTS ON JOB DISCRIMINATION," Press Release of the Conference on Equal Job Opportunity, Sponsored by the President's Committee on Government Contracts, held October 25 1955, Washington DC, Box No. 4, Entry 12, RG325 Records of the Committee on Government Contract Compliance, 6, 7.

<sup>54</sup> Address of Nixon before the English-speaking Union of the Commonwealth, Nov 26 1958, Speeches 1957, Box 17, RNC records. Nixon told his audience that "Colonialism has had its faults, but it also has had its virtues."

<sup>55</sup> In 1990, after the Berlin Wall had fallen, Nixon still insisted that communism was a threat in his memoir, *In the Arena*. Even in a 1992 publication, *Seize the Moment: The Challenge for America in a One-Superpower World* (New York: Simon and Schuster, 1992), he continued to warn of the dangers of socialism.

<sup>56</sup> Richard M. Nixon, *In the Arena: A Memory of Victory, Defeat and Renewal* (New York: Pocket Books, 1990), 364.

<sup>57</sup> North American Newspaper Alliance Column by Richard M Nixon for release May 8 1966, News Columns by Richard M. Nixon – 1966, Box 17, RNC Records.

<sup>58</sup> John Ehrlichman, *Witness to power: the Nixon Years*, (New York: Simon and Schuster, 1982), 222, 223.

<sup>59</sup> Hoff, *Nixon Reconsidered*, xi.

<sup>60</sup> Haldeman, , *The Haldeman Diaries*, (Sony CD-ROM, 1994), April 28 1969, H Notes Jan - June '69 [Jan - April 1, 1969] Part 1, Haldeman Notes, Box 40, WHSF: SMOF: Haldeman: Haldeman notes, NPMP.

<sup>61</sup> Hoff paints a stormy picture of the relations between various academics and journalists, accusing many of them (Stephen J. Ambrose in particular) of near-dishonesty. She points to inaccuracies of the Haldeman diaries that potentially occurred because Sony did not employ trained archivists: "Therefore, there is some reason to believe that such misrepresentations may also exist in the published and CD-ROM versions of his posthumously released diaries." Joan Hoff, "Researchers Nightmare: Studying the Nixon Presidency," *Presidential Studies Quarterly*, Volume XXXVI, Number 1, Winter 1996, 259-276, 269.

<sup>62</sup> Hand-written notes on yellow lined pad, 4/28, H Notes Jan - June '69 [Jan - April 1, 1969] Part 1, WHSF: SMOF: Haldeman: Haldeman notes, NPMP.

<sup>63</sup> Letter to Jensen from Moynihan, April 2 1969, [Ex] HU2 Equality - Beginning 4/2/69, WHCF; Subject Files HU [Ex] HU, NPMP.

<sup>64</sup> Memorandum for the President from Daniel P. Moynihan, September 20 1971, President's Handwriting, December 1 thru 15 1971, Box 2 (Folder 2), WHSF: SMOF: POF, Contested Files, NPMP. Moynihan was not the only staff member to express his opinion. The "fountain," as many on Nixon's staff called Patrick Buchanan, could normally be relied upon to give an opinion on any subject. He clearly warmed to this one, gushing that "If there is no refutation, then it seems to me that a lot of what we do in terms of integration of blacks and whites -- but, even more so, poor and well-to-do, is less likely to result in accommodation than it is in perpetual friction -- as the incapable are played consciously by government side by side with the capable." Memorandum for the President from Pat Buchanan Aug 26 1971, President's Handwriting August 16 thru 31, 1971 Box 13, WHSF: POF: President's Handwriting, NPMP.

<sup>65</sup> Memo for the President from Moynihan, September 20 1971.

<sup>66</sup> *Ibid*.

<sup>67</sup> Memorandum for the President from Daniel P. Moynihan, November 13 1970, President's Handwriting November 1970, Box 1 [folder 1](boxes 1-13), WHSF, SMOF: POF, Contested Files, NPMP.

<sup>68</sup> Annotated Memorandum for the President from Moynihan, 8/4/1970, President's Handwriting August 1 thru 15 1970, Box 7, WHSF:SMOF: POF: President's Handwriting, NPMP.

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<sup>69</sup> Handwritten notes 6-19-70, JDE Notes of Meeting with the President - 1/1/70 - 6/30/70 [5 of 5] Box 1 [Documents from Boxes 3-14], WHSF: SMOF: Ehrlichman, Contested Files, NPMP. Nixon repeated the “do what’s right” phrase with regards to civil rights on many occasions throughout his presidency. See, for example the handwritten comments on Cabinet Meeting Agenda, 4/15/69: “re civil rights - P comments re don’t expect PR results - just do what is right.” WHSF: SMOF: Haldeman: Haldeman Notes, NPMP, and: “Understand clearly that politically we don’t win anything by our actions in the South. We have to *do what’s right*, but we must separate that from politics and not be under the illusion that this is helping us politically.” President’s Handwriting August 1 thru 15 1970, Box 7, WHSF: SMOF: POF: President’s Handwriting, NPMP.

<sup>70</sup> Cited in “Remarks of the Honorable Robert H. Finch before the Conference of Regional Education Laboratories,” July 17 1969, file marked “Admin Civil Rights,” Box 422, Papers of Edward W. Brooke.

<sup>71</sup> Nixon, *RN*, 437.

<sup>72</sup> Nixon, *In the Arena*, 353.

<sup>73</sup> Cited in Small, *The Presidency of Richard Nixon*, 5.

<sup>74</sup> See Richard Nixon, *Six Crises* (Garden City, NY: Doubleday, 1962).

<sup>75</sup> Nixon, *In the Arena*, 119.

<sup>76</sup> Wills, *Nixon Agonistes*, 244.

<sup>77</sup> Cited in Parmet, *Richard Nixon and His America*, 58.

<sup>78</sup> William Costello, *The Facts About Nixon: A Candid Biography* (London: Hutchinson & Co., 1960), 9.

<sup>79</sup> Cited in Gareth Davies, *From Opportunity to Entitlement: The Transformation and Decline of Great Society Liberalism* (Lawrence, Kansas: University Press of Kansas, 1996), 50.

<sup>80</sup> Excerpts from address of Vice President Richard M. Nixon, rally in Harlem, New York Oct 31 1956, Speeches 1956, Box 17, RNC records.

<sup>81</sup> Statement of Richard M. Nixon, CBS Radio Network, October 30 1968, RNC 1968 Campaign: Press Releases and Nixon Speeches, Box 5 1968 Press Releases and Nixon Speeches. RNC Records.

<sup>82</sup> Bridges to Human Dignity, an address by Richard M. Nixon on the NBC Radio Network, April 25 1968, Box 5 1968 Nixon Campaign: Press Releases and Nixon Speeches, RNC Records.

<sup>83</sup> Ambrose, *The Triumph of a Politician*, 124.

<sup>84</sup> Nixon didn’t lack for critics of the black capitalism idea. The United States Conference of Mayors stated in July 1968: “Consideration should be given to not using the phrase ‘black capitalism.’ Most of the investment and small business projects, now being discussed, that have the support of Negroes, do not resemble capitalism. They are much more in the nature of cooperatives. To people who feel they have been exploited by capitalism, black capitalism is not especially attractive.” (Urban Affairs Plank presented by National League of Cities, United States Conference of Mayors, July 18 1968.) Andrew Brimmer, the only black member of the Federal Reserve Board, was also a severe critic. Roy Wilkins of the NAACP mentioned in a White House Press Conference held just after Nixon’s inauguration that “...we have some reservations on the Black Capitalism idea.” (The White House Press Conference of Roy Wilkins, National Association for the Advancement of Colored People, the Fish Room, Feb 7 1969, 105 Closed [desegregation][1 of 2], Box 30, WHSF: SMOF: Ehrlichman, NPMP.) Congressional liaison Bryce Harlowe told Ehrlichman in the summer of 1969 that “There is no doubt that ‘black capitalism’ has developed into something of a public relations problem for the Nixon Administration, a problem whose dimensions emerged in July at hearings before the House Select Committee on Small Business. Not one non-governmental witness, from Roy Innis, chairman of CORE, to the American Bankers Association commended the Administration.” (Memo from Harlowe to Ehrlichman, Aug 9 1969, Files of John Ehrlichman re: EEOC # 379 [CFOA 7730], Box 86, WHCF: SMOF: Garment, NPMP.) See also Benjamin L. Masse “Testing Black Capitalism,” *America*, (December 5 1970), 17-19, Frank Hoy, “Bleak Facts Slow Black Capitalism,” *The Washington Post*, Sunday, Aug 31 1969 (copy in Files of John Ehrlichman re: EEOC # 379 [CFOA 7730], Box 86, WHCF: SMOF: Garment, NPMP. For book-length contemporary critiques, see Frederick E. Case, *Black Capitalism: Problems in Development* (New York: Praeger, 1972) and Theodore L. Cross, *Black Capitalism* (New York: Atheneum, 1969).

<sup>85</sup> Actually, Nixon was less sure of the FAP than he was that the existing welfare system was a “debilitating dependence which erodes self-respect and discourages family unity and responsibility,” as the 1968 Republican Party Platform succinctly put it. (Republican Platform 1968, ‘We must think anew and act

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anew', adopted by the RNC August 6 1968, Box 54, SMOF: Garment). Nixon told television interviewers that "there is nothing that I feel more strongly about than welfare reform and the proposal for revenue sharing..." before adding, somewhat defensively, "Now, if anybody wants to defend the present welfare program let them be against ours." (Transcript of a conversation with the President on live TV and radio with John Chancellor, NBC, Eric Sevareid, CBS, Nancy H. Dickerson, PBS, and Howard K. Smith, ABC, held in the library, Jan 4 1971, Meetings/Phone Conversations with President – CWC's notes – Mtg . With the President [2 of 3], Box 15, SMOF: Colson, NPMP. Nixon's vehement hatred of welfare was expressed in a request made to Johnny Cash when he played at the White House. Nixon asked that Cash sang a "A Boy Named Sue," "Okie from Muskokie," and a ditty entitled "Welfare Cadillac," which had as its theme a single mother with a Cadillac paid for from welfare receipts. Cash, to his credit, pronounced the latter song "terrible" and was only reluctantly persuaded to continue with the engagement. He did not perform the song. See Talking Paper - Meeting with Lyn Nofziger: Memo for Mrs. Stuart from HRH, March 9 1970, HRH Memoranda A-Z March 1970, Folder 4 - Boxes 53-60, WHSF: SMOF: Haldeman, Contested Files. For an insightful if a little biased account of the fate of the FAP, see Moynihan, *The Politics of a Guaranteed Income* (New York: Random House, 1973).

<sup>86</sup> Cited by Gerald Ford in *CR*, 91<sup>st</sup> Congress, Vol. 115, 40906. See also Robert P. Schuwerk, "The Philadelphia Plan: A Study in the Dynamics of Executive Power," *University of Chicago Law Review*, Vol. 39, 1971-72, 723-760, 749.

<sup>87</sup> William Safire, *Before the Fall: An Inside View of the Pre-Watergate White House* (New York: Doubleday and Co., 1975), 237.

<sup>88</sup> Thus, Graham asserts that "For having fought so successfully to defend the Philadelphia Plan and to unleash the EEOC as a prosecutor in the courts, Nixon followed up his victory in the Equal Employment Opportunities Act of 1972 by turning up his campaign rhetoric and directing it against the institutions he was empowering and the purposes they were furthering." (Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960-1972* (Oxford University Press, 1990), 445).

<sup>89</sup> Letter contained (loose) in Box 4, [Ex] HU 2 1972 Onwards, WHCF: Subject Files: HU (Human Rights), NPMP.

<sup>90</sup> A statement by Richard M. Nixon: NBC Radio Network, March 7 1968, Box 5 1968 Nixon Campaign: Press Releases and Nixon Speeches, 1968 Presidential Campaign: RNC news releases 8/23/68 - 9/25/68, Comment 8/26/68 - 11/4/68, Nixon speeches 10/67 - 9/25/68, RNC Records.

<sup>91</sup> Statement of Richard M. Nixon, Concorde, NH, Feb 3 1968, 1968 Presidential Campaign: RNC news releases 8/23/68 - 9/25/68, Comment 8/26/68 - 11/4/68, Nixon speeches 10/67 - 9/25/68, Box 5 1968 Nixon Campaign: Press Releases and Nixon Speeches, RNC Records.

<sup>92</sup> Graham, "Race History and Policy: African-Americans and Civil Rights since 1964," Hugh Davis Graham, edit., *Civil Rights in the United States* (University Park, PA: 1994), 12-39, 14, 15.

<sup>93</sup> See Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford University Press: Oxford, 1979), 118-173.

<sup>94</sup> For an excellent exposition of the reconstruction of American politics around a diminished sense of the self, see James L. Nolan, Jr., *The Therapeutic State: Justifying Government at Century's End* (New York, NY: New York University, 1998).

<sup>95</sup> In another part of the same speech, Nixon stated that: "Government would be capable if all we cared about were the old freedoms from. But it fails because it stunts the new freedoms to." (Statement of Richard M. Nixon, Concorde, NH, Feb 3 1968).

## Section III

# CONTRIBUTIONS TO THE DEVELOPMENT OF AFFIRMATIVE ACTION OUTSIDE OF THE POLITICAL REALM

In the previous chapter, we observed that the bulk of policies we now know as affirmative action was created during the Nixon administration, either with Nixon's direct input or by advisers and aides. Other aspects of the problem, however, remain to be explained. Until the end of 1972 the term "affirmative action" meant little to those outside the federal bureaucracy. At what stage did this group of policies become cohered under the title "affirmative action"? In other words when did affirmative action become known as affirmative action? Certainly, no one recognised the importance of the Philadelphia Plan, Order No. 4, or even revised Order No. 4 until they had been in place some time. A second, related question concerns the creation of affirmative action as a public issue with defined positions. There was virtually no opposition until, on the pages of *Commentary* in late 1971 and 1972, writers started attacking "quotas." Even then, the discussion was relatively confused. In 1973 antagonism towards affirmative action became more coherent but most Americans first became aware of the issue with widespread publicity surrounding the *Bakke* case when the Supreme Court handed down its decision in 1978. The arguments against affirmative action today often begin with a tragic tale of white males who, though eminently qualified for a positions, are passed

over in favor of women or minority candidates. This point – that affirmative action discriminates against white males – did not immediately gain resonance. As will be shown in this chapter, little of the emotive edge accompanying the debate today was evident, even as Order No. 4 identified an estimated three-quarters of the American population as an “affected class.”<sup>1</sup> Many of the features of the modern debate that are taken for granted today developed only gradually.

To understand these questions, it is necessary to explore some of the social, cultural and intellectual developments that provided the context for the emergence of affirmative action. It will be suggested here that the *context* in which affirmative action is viewed has been crucial for determining the way it is seen. In the previous chapters, it is argued that the implementation of the first affirmative action policies was a response to a serious legitimization crisis that stalked the United States in the late 1960s. These policies replaced problematic traditional methods of ensuring equal opportunities through (and within) labor unions, government contractors, federal, state, and local government employment and, later, college and university admissions. However, they contributed to the further undermining of the institutions that they affected by implying both existing traditional methods of ensuring equal opportunities, especially the long-standing commitment to principles of merit, were bankrupt, and by indicting the institutions themselves as incapable of offering real equal opportunities. As pointed out in the first part of this dissertation, the biggest barrier these first policies faced was their apparent contradiction of the 1964 Civil Rights Act, with its formalising of the traditional unwritten American institution of equal opportunity for all individuals. Finally,

affirmative action policies undermined the belief that American institutions were capable of achieving such integration without government intervention.

The Habermasian model is invaluable in understanding the process whereby a legitimation deficit creates the perceived need on the part of the State for intervention which in turn creates further legitimacy problems for the new State apparatus. Habermas correctly criticised Weber's assertion that the legitimacy of a State lay ultimately within what Weber termed the "rational-legal sphere." Habermas's theory, however, might be criticised for being ahistorical as well as for overemphasising the role of the State, particularly as the root of the problem. He leaves unexplained, for instance, the historical gaps between a serious legitimation crisis existing in the 1930s and the legitimation crisis at the end of the 1960s. It does not appear, when examined in specific historical circumstances, that the State becoming progressively involved in many spheres of American life during the Second World War led inexorably to a worsening legitimation crisis. Obviously, historical factors at least partially extraneous to the State affect the entire process. The most serious oversight on the part of Habermas seems to be his model's omission of the role of politics on the problem of State legitimation. The efficacy of many of the aforementioned institutions within American society existed because of the link between citizen and State. Their authority lay in their perceived ability to provide guidance and direction to the individual citizen, to enlist them in a cause, but also in the possibility that the individual citizen might be able to pull them in a direction conducive to his or her interests. Crucially, *the perception of existing political and social alternatives* must be present in order to motivate the individual citizen to lend authority to a given institution. Good and evil must be present to legitimate the authority

of religion (at least in its traditional sense). Trade unions flourished when the interests of workers were seen as an alternative to the interests of the owners. Political parties exist to pose alternatives visions of society and/or methods of achieving them to other political parties. Universities become technical training colleges without alternative ideas or schools of thought competing with each other. Democracy creates the idea that the citizen can influence the affairs of the State by choosing one political alternative over another. In a situation where there appears to be no alternatives, the authority and, indeed, the *raison d'être* of these institutions is put into serious question.

Besides the Habermasian imperative, then, we must place the perception of the closing down of alternatives in our understanding of how and why affirmative action became predominant. At one level, as we have seen, the destruction of civil rights programs relying at least partially on voluntarism on the part of white Americans, such as bussing and open housing, left affirmative action programs as the most important ways of accomplishing this goal. At another level, though, the creation within influential texts of an absence of alternatives ensured that affirmative action would become more than simply a group of policies

Chapter 10 will examine, historically, how affirmative action became an issue. Chapter 11 will then look in particular at two influential and interconnected intellectual trends that provided a new intellectual context for affirmative action, both justifying it as a coherent strategy and making it an issue. John Rawls' enormously influential *A Theory of Justice* changed the way in which many Americans viewed questions of merit and justice. Second, what might be called the "zero-growth" school of economics, based partially on but far outlasting economic difficulties in the early 1970s,



removed political and social alternatives based on the premise of constant economic growth, ensuring that the earlier liberal idea that continuing material progress would underwrite racial and other social progress (“a rising tide lifts all boats”) was bankrupt. It also turned focus upon issues connected with the realm of distribution rather than that of production. These trends, taken together, ensured that affirmative action grew from a few policies to an institution. Also, the zero-sum perspective, by emphasising a finite number of resources, contributed to the most morally contentious issue of affirmative action – whether white males were victimised by these policies.

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<sup>1</sup> Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960-1972* (Oxford University Press, 1990), 412.

## Chapter 10

### A BRIEF HISTORY OF THE *ISSUE* OF AFFIRMATIVE ACTION

The remarkable thing about affirmative action policies, given how many Americans have been affected by them, is that little comment greeted their arrival. Exceptions to quotas in the past tended to be argued in very general terms, usually invoking democratic principles. Though discussion took place in various arenas, references to it are scattered, implying that affirmative action – in the modern sense – was not considered particularly important. The term “quotas” in the 1950s referred to setting maximum limits of blacks within white neighborhoods in order to prevent the perception that blacks would “take over” the neighborhood and the panicked white reaction to this perception – white flight. Chicago social activist Saul Alinsky proposed these sorts of quotas to the United States Commission on Civil Rights in 1959. He told them, “those who criticize the quota system for its undemocratic aspect have provided no practical solution.”<sup>1</sup> In 1963-64 a minor controversy ensued after some civil rights leaders suggested that quotas of blacks might be needed to repair the economic damage done to African-Americans. As cited in chapter two, John F. Kennedy brushed aside the suggestion of quotas. New York Governor Nelson Rockefeller argued that quotas were both unlawful and counter to American principles.<sup>2</sup> National Urban League Chief Executive Whitney Young and cleric Kyle Haselden explicated the argument in the pages of *the New York Times Magazine* in 1964. Young supported a domestic “Marshall Plan” for blacks in his 1964 book, *To Be Equal*. He invoked principles of distributive justice, noting that America has “long given special, emergency aid to the oppressed, the sick, the

handicapped and deprived.” Haselden, though a sincere supporter of civil rights, rejected the idea of compensation and argued that race-conscious programs might perpetuate racism, stigmatize African Americans, and be unfair to those not helped and blame the living for the crimes of the dead.<sup>3</sup>

George Wallace, picking up on the debate, objected that union seniority rights would be attacked by the suggestion of quotas.<sup>4</sup> The *Commentary* discussion on the impact of the struggle for black civil rights on liberalism began by asking those present what they thought of recent suggestions of 10 percent quotas in jobs and college places for African-Americans. Academic Sidney Hook’s objections (to suggestions by friends that Bronx High School of Science racially balance its intake of students) centred on the lowering of standards of achievement for blacks. Myrdal disagreed with preferences on the grounds that they could not work within a liberal framework. They would, he insisted, create democratic opposition amongst whites, allow less qualified to replace better qualified people, create tokenism and solidify divisions between the races. Most of all, Myrdal was concerned about the undermining effect that quotas would have on American institutions. These institutions were already in place, he maintained, to eliminate discrimination: “A local labor union may stand for discrimination, but the national association won’t; it will be more liberal because it represents a greater investment of American ideals.” Hook, however, argued that preferential treatment was not necessarily incompatible with liberalism and might find a limited place within the US in the future. In all the discussions around this issue, however, the argument that whites would be victimized was not heard. The debate was sufficiently obscure to disappear almost entirely within a year.<sup>5</sup>

Between 1965 and 1969 the issue of quotas hardly existed. Certainly, there was no solid left/right side to the debate. Senator Everett Dirksen, who had insisted on the inclusion of 703(j) stipulating that the 1964 Act did not call for quotas, brought up the Philadelphia plan during 1968. After a clash with Comptroller General Staats, the Johnson administration dropped the plan, thus avoiding the issue.<sup>6</sup> Few commentators noticed. Vieira repeated the objections Haselden had listed in 1964 and added that the government would relinquish its “educative role” against racism.<sup>7</sup> The provocative right-wing columnist William F. Buckley, however, came out in favor of quotas. In a column in 1969 Buckley stated: “We must in fact encourage a pro-Negro discrimination.”<sup>8</sup> If any other comments on the issue appeared, they remain hidden from view. In the congressional debate in 1969 the opposition to the Philadelphia plan did not oppose quotas except on the basis that quotas were against the law. Those in opposition highlighted the fact that the President was steamrolling over the interests of Congress, that labor’s right to free bargaining was being usurped, and that the Philadelphia plan represented another attack on liberty.

### Little opposition to early affirmative action programs

For nearly three years *after* the Philadelphia plan, the OMBE’s 8(a) programs, Order No. 4 and even Revised Order No. 4 were in place, the issue of quotas remained largely outside of public discussion. Some dissent, however, did exist. First, labor reacted against the Philadelphia plan as it contradicted the seniority system that had been in place since the 1930s. AFL-CIO president George Meany objected strongly to the

plan as an “attempt to use the Building Trades as a whipping boy ...designed to give the Nixon administration a few Brownie points to offset their shortcomings in the civil rights field as a whole.” The “greatest drawback to the plan,” he said, “is that it diverts attention from the real solid task of training and qualifying minority workers for a permanent place in the ranks of skilled workers.” Indicating that he did not oppose the principles involved in the plan, he criticised the plan for the fact that it “applies only to construction work.”<sup>9</sup> In a letter to C. J. Haggerty, President of the AFL-CIO Building & Construction Trades Department, in January 1970, Meany praised the Chicago plan as a “significant forward step” and a possible guide for other areas of the nation.<sup>10</sup> Not surprisingly, many observers felt that Meany’s objections, given the lily-white composition of some of the unions involved, were groundless or, more to the point, centred on the fact that only construction workers had been targeted. When Sam Ervin objected to the circulation of a draft version of Order No. 4, Meany had no comment.<sup>11</sup>

An interesting and enlightening example of an early exchange on affirmative action policies between Macklin Fleming, Justice of the Court of Appeal, State of California, and Louis Pollak, Dean of the Yale Law School, was published in *The Public Interest* in the spring of 1970.<sup>12</sup> Yale Law School initiated a system of quotas for the first year class of the fall of 1969 whereby 43 black students were admitted, of whom five qualified under the regular standards and 38 did not. Macklin Fleming objected that this would lead to separate law schools and legal institutions – one black and one white,<sup>13</sup> that the under-qualified black students would suffer in such a highly competitive atmosphere (leading to “aggressive conduct” by black students<sup>14</sup>), that Jews and “orientals” would suffer from the inevitable extension of quotas to other groups. Fleming

stated that “the American Creed, one that Yale has proudly espoused, holds that an American should be judged as an individual and not as a member of a group.”<sup>15</sup> Dean Pollak replied that standards had been relaxed as a matter of course with regard to black law students for over 15 years – “the admissions practices which you call into question are not really new.” Pollak also argued that it was not blacks alone that had benefited from such a program.<sup>16</sup>

However, with these exceptions to the rule noted, Daniel Bell was no doubt correct to observe in 1973 that “(w)hat is extraordinary about this change [to affirmative action] is that, *without public debate*, an entirely new principle of rights has been introduced into the polity.”<sup>17</sup> Despite an extensive search, I have found no evidence that anyone in the media thought the new involuntary affirmative action warranted comment rather than simply reportage.<sup>18</sup> None of the leading liberal publications mention the issue once until the latter half of 1972. Though the *New Republic* does mention the controversy in 1972, the *Nation* contains no comment at all on the matter throughout Nixon’s first term of office.

Why was there so little interest? Despite the protests of some of those opposed to the programs, affirmative action programs were understood not as affirmative action per se but as particular programs that would help make real the promise of equal opportunities inherent in the American Creed. Affirmative action programs had not yet been bundled together as having a common theme. For Nixon, they were bound together only as civil rights strategies compatible with his own mores. For most administrators they were simply minor civil rights programs overshadowed in particular by the bussing

issue and even by housing integration, a testament to the fact that the goal of integration of black Americans within the mainstream still dominated.

Little political opposition can be found to affirmative action programs, apart from Ervin's faintly heard protest about Order No. 4, after the initial attempts to add the rider to a Senate Appropriations Bill in December 1969.<sup>19</sup> In July 1972, in the run-up to the election, the issue of "quotas" came up but only amongst two specific groups, both of whom were targets for the Republicans. Labor, of course, had opposed the Philadelphia Plan. Many felt that the hardhat marches in May 1970 presaged the Republicans reneging on the commitment to the Philadelphia Plan (not least undersecretary Arthur Fletcher<sup>20</sup>) in an effort to attract labor's vote. Certainly, labor's traditional support for the Democrats was by no means guaranteed. AFL-CIO leader George Meany refused to endorse the Democrats in the run-up to the 1972 election and much of the blue-collar support that the Democrats had been alienated by Democratic policies. However, labor's alienation from the Democratic Party's was more the result of the perception that the Democratic Party had moved away from its traditional commitment to labor in favour of new "alien" values. Even more important, many blue-collar workers felt the Democratic Party's position on the Vietnam War threatened to "sell out" the interests of the country.

In light of labor's wavering support for the Democrats, Nixon actively pursued blue-collar votes, putting the promising young aide Charles Colson in charge of garnering labor and Catholic support for the 1972 Republican effort. Colson worried about the effect of the Philadelphia Plan on labor support and wrote memos urging the end of affirmative action in favour of the OMBE program.<sup>21</sup> He also urged the

administration to rid itself of Arthur Fletcher, who had accused the unions of “getting away with murder” in regards to equal employment opportunity.<sup>22</sup> Colson did not succeed in overturning the administration’s affirmative action policy though Fletcher resigned in early 1972.

Yet Colson’s worries about the blue-collar vote and the Philadelphia Plan were needless. The unions, suffering a long decline of influence and power and protective of their alignment with civil rights groups, failed to get any real campaign against quotas off the ground. A demoralised and increasingly individuated construction work force had larger problems than the loss of the seniority system with which to contend. From the winter of 1969/1970, a recession had effected the industry. The overall unemployment rate climbed to nearly five percent in the spring of 1970, the highest it had been in five years. Building and housing starts were the lowest they had been for a decade.<sup>23</sup> The issue also tended to settle down once it became clear that the actual number of black Americans hired on construction sites was low, given the difficulties in finding qualified minority laborers and a prolonged apprenticeship period set by the Department of Labor’s Bureau of Apprenticeship and Training (BAT). As Fletcher concluded, “the real test is going to come when the construction industry starts moving.”<sup>24</sup> But the construction industry did not even budge. The paltry amount of new jobs meant that affirmative action had little visible effect. As Kevin Phillips, the right-wing Republican pundit who had worked for Nixon in 1968 and published *The Real Majority* predicting Republican dominance in the 1970s (and whom the administration in 1969 felt they had to distance themselves from) stated, the mood inside blue-collar circles had become one of clinging to what still existed rather than arguing about who should control intake of workers. In



late 1972 a news summary, circulated amongst White House staff, cited Phillips, then a syndicated columnist, extensively:

...Phillips views appointment [of Brennan] as part and parcel of hardhat-cum-Catholic strategy pushed effectively by Colson, and says obvious labor issues like minimum wage are no longer central to large group of old-line blue-collar workers who are increasingly preoccupied w/holding on to what they have in the face of sociological upheaval. Thus, Admin can win a “major political beachhead” among them w/out shifting many positions, says Phillips, noting “right to work” and quotas are dead issues.<sup>25</sup>

In other words, Phillips felt that objections of labor to old Republican anti-union positions *and Philadelphia Plan-related issues* could be overcome by appeals on various other issues. On the Vietnam war and on other “social issues, in Scammon and Wattenberg’s terminology, Nixon represented more continuation with past procedures than did the Democratic Party. For these reasons, amongst labor, quotas were a “dead issue.”

### Other early objections to affirmative action

The second group where resistance to affirmative action occurred early was amongst Jews, especially Jews close to the New York City orbit and within academia. Antagonism had occurred between black Americans and Jews sporadically since the 1930s in New York City, often due to the proximity of the two communities and Jewish ownership of businesses in black areas. In the late 1960s some black leaders made blatantly anti-semitic comments in a dispute over the control over public schools that peaked between September and November 1968. When the former SNCC head, James Forman, after declaring that existing “white Christian churches and Jewish synagogues”

should pay blacks reparations of some \$500 million, had announced his intention to disrupt services at Temple E-manuel, the Jewish Defense League attended with 175 men armed with baseball bats, pipes, and chains. Liberal, middle-class Jews, including the rabbi of Temple Emanu-el, who stated that Forman was welcome to use the pulpit, sought to distance themselves from these disputes. However, many disputes were breaking out within various colleges and universities where militant blacks were challenging existing authorities. Changes to institutions like Cornell, where 16 black students armed themselves with rifles and shotguns made demands for more black admissions, and City College of New York (CCNY) in 1968-69 created resentments amongst Jewish academics.<sup>26</sup>

There was also the fear apparent in Macklin Fleming's letter that a quota system would inevitably mean that ethnic or racial groups proportionally over-represented in top universities would suffer under any quotas. Such fears were not unwarranted. Leonard Garment, in defending affirmative action policies, noted ironically that he had suffered exclusion from Columbia Law School in the 1930s because, within top law schools, a maximum quota on the number of Jews meant that better qualified Jews were passed over in favour of gentiles.<sup>27</sup> A debate arose from late 1971 on the pages of the American Jewish Committee's publication, *Commentary*. Jews (besides labor) were another group that CREEP (the Campaign to Re-Elect the President) attended to, amongst their many tasks. *Commentary*, a magazine dedicated to Jewish issues, carried more articles about quotas than other periodicals at the time.

Missing from the early arguments around these policies, however, are many of the key points made in discussions about affirmative action today. In particular,

there appears to be no hard and fixed arguments against affirmative action per se. For instance, the substance of Alan Bakke's case – that he had been discriminated against as a white male – had yet to be heard, except from those who viewed all civil rights policies as attacks on whites.<sup>28</sup> Nor did opponents tend to attack *all* affirmative action policies. Justice Fleming, for instance, admitted that “racial quotas may serve a purpose in some contexts...”<sup>29</sup> Exponents of affirmative action policies tended to downplay the difficulties presented in the arguments of opponents – many, as we observed previously, stressed the special-case nature of a particular program. Much of the early criticism on the pages of *Commentary* simply implied that a worthy program was being taken too far. Stephen Steinberg, in an article on quotas appearing before the storm had broken, told readers:

...the quotas adopted in recent years are designed to increase the representation of disprivileged blacks. One can only speculate on whether this will significantly diminish educational opportunities for Jews. It is just as plausible that the increasing black enrolment will be at the expense of those students who previously were admitted less for their academic qualification than because they had the “right” family credentials or went to the “right” preparatory school.<sup>30</sup>

Writing in early 1972, Earl Raab commended a program put in place by the San Francisco School Board designed to “implement a program of faculty racial and ethnic balance which more closely approximates the racial and ethnic distribution of the total school population so long as such efforts maintain or improve quality of education.” “No trouble arose over these policies” Raab asserted. However, “a subtle but critical line was crossed beyond affirmative action” when the School Board decided to eliminate 71 jobs by a strict seniority system that applied to “Other Whites.” (It is perhaps instructive that the only objection to affirmative action here is when jobs are eliminated along an affirmative action basis, rather than created.) Similarly, Elliot Abrams, in attacking “The

Quota Commission” (meaning EEOC), was careful to blame “an excess of zeal” rather than affirmative action itself.<sup>31</sup>

Meanwhile, much of the logic behind affirmative action began to be accepted both within government programs and in court decisions. Affirmative action programs burgeoned, especially after, on March 8 1971, the Supreme Court handed down the historic *Griggs v. Duke Power Co.* decision. Black employees at the Power Company had argued that the company’s requirement of a high school diploma or passing of intelligence tests as a condition of employment in or transfer to jobs at the plant breached their civil rights. By finding in their favour, the Court validated the idea of “disparate impact,” whereby employer practices need not have the intention to discriminate but are judged as discriminatory if they have the effect of discrimination. The implication was that, if a disproportionately small section of a given workforce was black, a company must act to rectify the situation in order to avoid a lawsuit. *Griggs* legitimated in law the idea of institutional discrimination.<sup>32</sup> At the same time, HEW began issuing new guidelines that effectively extended affirmative action programs beyond their original meaning. A letter from HEW, dated March 31 1971, to the President of the University of Arizona in response to a request for clarification, directed that: “Department heads should be advised that, in addition to recruitment of females, affirmative action requires that Government contractors considers other factors than mere technical qualifications.”<sup>33</sup> It is notable that, before Revised Order No. 4, including women within the category of “affected classes” for the purpose of affirmative action plans of government contractors, was issued in December 1971, women were effectively included in the “affected classes” by HEW. In late 1971, a Democratic amendment to ban quotas was defeated and, after

the Erlenborn substitution bill won the day, EEOC gained the power to sue on March 2 1972.

Yet the discussion about quotas and affirmative action was only just beginning. As Glazer was able to observe: "Clearly, in 1972, something new was happening."<sup>34</sup> Because of the forthcoming election, the debate reached the ears of the President. Nixon might not have seen fit to comment had he not had his eye on potential new constituencies. The *New York Times* cited a "forthcoming study" in May 1972 that argued "that the Presidential election can be swung by either Republicans or Democrats with strategies directed at black, Spanish-speaking, Jewish, Italian, and Slavic voters. These groups make up 30 to 33 percent of the electorate, concentrated in major states."<sup>35</sup> A Harris Public Opinion Analysis, published October 12 1972, confirmed what Nixon had instinctively known for some time. "Two of the sharpest fall-offs from the Democratic column in 1972 for President have been taking place among two quite different ethnic groups -- those whose ancestral origins trace back to Italy and voters whose religion is Jewish."<sup>36</sup> Safire exclaimed that "...for the first time, the Nixon campaign was openly trying to get Jewish voters to switch, and the very fact of the effort was new." Though they voted overwhelmingly for Hubert Humphrey in 1968, by the end of 1971 Nixon sensed that an opportunity lay open. He directed his statements regarding quotas directly at Jewish interests, as the letter to Phillip Hoffman written in August 1972 indicates. Nixon made a similar attack on quotas in his Labor Day speech on September 3 1972.<sup>37</sup>

However, Democratic candidate George McGovern also denounced quotas, indicating that the political sides of the debate had not yet firmed. The

Democratic Party's relationship with quotas was even more ambiguous than that of the Republicans. They (later followed by the Republican Party) adopted their own quotas as a method of choosing delegates at the same time as the Philadelphia Plan was being debated. On November 19 and 20 1969, The 28 person Commission on Party Structure and Delegate Selection, chaired by McGovern, passed a motion on delegate selection after a discussion mirroring the one between Staats and the Department of Labor. The delegates debated whether "some reasonable relationship" between the racial, gender and age makeup of states and delegations should be "urged," "recommended," or "required." In the end, the Commission "recommended" some form of proportionality for 1972, after which it would be "required." The 1972 delegation to the convention duly contained a representation including youth in torn jeans, black delegates wearing afros and dashikis, and militant feminists.<sup>38</sup> One delegate, no doubt expressing the hostility of a large percentage of labor delegates to the conference to these new elements, said at the Democratic Convention that he would work for "blood, sweat and tears" but wouldn't work for "sex, dope, and queers."<sup>39</sup>

The Republicans were able to effectively label the Democrats the "quota party" despite McGovern's protestations to the contrary and despite the fact that it had been the Republicans that had saved quotas from a Democratic attack at the end of the previous year. Moreover, the issue of affirmative action was simply pushed aside. The major discussion – one which dominates discussion on domestic issues in the White House in 1972, was bussing. Thus, neither Nixon's nor McGovern's position on "quotas" was much scrutinised.<sup>40</sup>

## Growth in policies and confusion

The situation in 1972 is best characterised as one of rapidly expanding affirmative action programs and political confusion about the issue. The *New Republic* felt it had to tell its readers what precisely affirmative action was and what the positions of the candidates regarding the issue were. It expressed no opinion either way, observing that both candidates had come out against quotas while supporting affirmative action programs. “It would be instructive to hear Mr. Nixon’s opinion of the affirmative action program... But he hasn’t given it; we’ll have to be content with his stern message on quotas.”<sup>41</sup> Not surprisingly, public administrators also were confused as to what affirmative action was. David H. Rosenbloom, an American Society for Public Administration fellow with the CSC, set out three major strategies to attain equal employment opportunity in a 1972 article. The first was to eliminate discrimination, the second was to “take ‘affirmative action’ to attempt to eliminate inequalities of opportunities,” and the third was the “utilization of numerical goals for minority and female hiring and promotion.”<sup>42</sup>

The issue was perhaps best defined within higher education, where it appeared to be largely confined in 1972. Paul Seabury’s article published in February 1972 about quotas at universities provoked a flurry of letters to the editorial board at *Commentary*, published in the May 1972 issue (contrasting with the very few letters following Elliot Abram’s article on EEOC despite the fact it was published later in the year). Even as Nixon uttered his denunciations of quotas, Assistant Attorney General J. Stanley Pottinger, one of Nixon’s more conservative staff members on civil rights questions,<sup>43</sup> felt obliged to clarify the rules concerning universities enforced by HEW to

representatives of six Jewish groups, effectively muddying the waters: “While HEW does not endorse quotas, I feel that HEW has no responsibility to object if quotas are used by Universities on their own initiative.”<sup>44</sup> HEW had prodded 14 universities into submitting affirmative action plans during 1972 that involved the hiring of staff and intake of students, including Brown University.<sup>45</sup> Others created and implemented their own affirmative action programs after the federal government successfully defended the Philadelphia Plan in court. Even before the election, indicating that Nixon’s attack on quotas had done nothing to stem the tide of affirmative action, HEW issued “Higher Education guidelines: Executive Order 11246,” which put more pressure on universities to comply.<sup>46</sup> Much as pressure on the universities made more of an impact than had pressure on construction firms and unions, however, the impact was still not yet large. Most affirmative action plans effective in the higher education sector used three or five year deadlines. By 1975, the number of African-Americans on previously white campuses rose from 1970 by an impressive 173 percent to a still modest 310, 000.<sup>47</sup>

In 1973 affirmative action gathered pace. EEOC, armed with its new powers and backed by the courts on the legitimacy of disparate impact, brought charges against such large firms as General Motors, General Electric, Sears, Roebuck and Co. and against the union, the United Auto Workers.<sup>48</sup> Between May 1973 and May 1974, 64 percent of all non-postal federal employees hired were minority group members. By then blacks were over-represented in federal employment; they held 14.6 percent of all non-postal federal employment. They were even more represented in postal jobs.<sup>49</sup> A major case began in 1970, when Atlantic Telegraph and Telephone (AT&T) filed a request for a rate increase with the Federal Communications Commission, and EEOC petitioned to



intervene on the basis that the company had violated equal opportunity requirements of the Federal Communications Act and the Civil Rights Act. Five percent of EEOC's complaint backlog were AT&T grievances and EEOC launched the action in part to reduce this burden. The AT&T consent decree was filed in the US District Court for Eastern Pennsylvania in January 1973. The decree contained an affirmative action plan with \$15 million in back pay to 13,000 women and 2,000 minority men and \$23 million to be paid annually to 36,000 minority and female workers. A second consent decree was filed in May 1974 that covered \$30 million in back pay for 25,000 management employees.<sup>50</sup> The case had a huge impact upon the industrial relations policies of virtually all large companies in the US. Affirmative action programs thus also expanded (as EEOC and others no doubt anticipated) when firms not directly in the firing line of the agencies and the courts, fearing lawsuits, increasingly consulted EEOC or the courts regarding decisions that they would have decided independently. For example, in September 1973, Jersey Central Power and Light decided to lay off 200 workers. It asked a Federal Court to decide which of two contracts – one with the International Brotherhood of Electrical Workers and one with EEOC – it should honour when deciding who to lay off. The judge ruled that both had to be honoured. The company asked the court to review its list. Other companies and agencies hired specialist lawyers and personnel managers to evaluate and negotiate personnel decisions with reference to affirmative action stipulations. Despite the profusion of activity, though, the conception of affirmative action was not clear. As Marilyn Bender, writing in the *New York Times*, noted in 1974: "Confusion and uncertainty inevitably follow major changes in the law or

social policy but the job discrimination picture seems unusually chaotic to those who must grapple with it.”<sup>51</sup>

Another factor influencing the growth of affirmative action as policies and as an issue was the decline throughout the 1970s of alternative civil rights strategies. As Graham was able to note in a book detailing policy during the Carter years, “[b]y 1980, two of the nation’s great post-war crusades in civil rights policy, the racial integration of America’s schools and housing, had largely failed.”<sup>52</sup>

By the summer of 1973 the administration felt conscious enough of the association between quotas and affirmative action that it avoided speaking at all of affirmative action. White House aide Ken Cole instructed staff preparing a press release regarding opportunities for “Spanish Speaking Americans” to “(o)mit the word “affirmative” in the first paragraph. Many ‘affirmative action’ programs have turned into quota systems - to which we are philosophically opposed. At this point, it is much better to talk of action programs than to have the President endorse all affirmative action programs.”<sup>53</sup> However, Watergate had begun to dominate the thoughts of the administration and the pundits, leaving little space for affirmative action. No record of any discussion involving the President on affirmative action in 1973 or 1974 has yet been uncovered. During the Ford Administration, however, the issue made more headlines. At a Cabinet Meeting held on June 25 1975, the subject of affirmative action dominated the agenda. The President, Secretaries Henry Kissinger, Caspar Weinberger, John Dunlop, William Coleman and Attorney General Edward Levi discussed “how can we get out of the absurdity of regulations without it being perceived as a public retreat from the commitment to equal employment opportunity?”<sup>54</sup>

In 1974, as the number of programs, regulations and legal decisions using affirmative action as a basis for personnel and other decisions increased, some of the murkiness surrounding the issue disappeared. The Supreme Court ruled against a plaintiff who complained that his rights had been denied when he missed out on a college place despite being qualified because of an affirmative action plan. By this time many more interests were becoming involved. In the case *DeFunis v. Odegaard*, the AFL-CIO, B'nai B'rith filed *amicus curiae* in support of DeFunis' claims, whereas the American Hebrew Women's Council, the Union of Auto Workers (UAW), and the Union of Mine Workers Association (UMWA) filed *amicus curiae* against DeFunis.<sup>55</sup> In 1975 Nathan Glazer published the first book-length critique of affirmative action, *Affirmative Discrimination*. Glazer's book, an intelligent and reasoned analysis lacking much of the histrionic nature of some later critiques, was significant in that it was the first to treat the various disparate policies thematically. It was in 1978, however, that most Americans first heard of affirmative action. Then, the Supreme Court handed down a decision in favour of the plaintiff in the much-discussed *Bakke v. California Board of Regents* case. By the late 1970s, the issue had grown from a small dispute over whether or not some relatively insignificant policies had been overzealously applied into the largest discussion in the United States touching upon matters of race.

### Lateral expansion of affirmative action

Besides the programmatic expansion in affirmative action policies and affirmative action-based decisions, strategies and regulations, affirmative action grew

laterally. The so-called “affected classes” within affirmative action grew to include more and more groups within US society. The Philadelphia plan, though it specified “minorities,” really only dealt with the dearth of blacks in construction employment. As was indicated previously in this dissertation, the justification for the Philadelphia plan was in its specific application to African-Americans within the construction industry. In fact, the term minorities had, in regard to contract compliance policies, really referred to African-Americans.<sup>56</sup> Even with the inclusion of the category of sexual discrimination in the 1964 Civil Rights Act, the categories of other minorities and women were usually added for consistency’s sake in the late 1960s. EO11246 in 1965, for instance, was issued without reference to sexual discrimination. It was only changed two years later when EO 11375 supplanted it. However, in 1971, Revised Order No. 4 included women as an affected class. In January 1973 the US Department of Labor, Office of Federal Contract Compliance, issued new guidelines to cover discrimination against persons because of religion or ethnic origin. These guidelines stated:

Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and South European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups continue to be excluded from executive middle management, and other job levels because of discrimination based on their religion and/or national origin. These guidelines are intended to remedy such unfair treatment. (60-50.1 of Chapter 60, Title 41, Code of Federal Regulations)

In the end, it was decided that affirmative action would deal only with “unchanging physical characteristics.”<sup>57</sup> Also in 1973, however, affirmative action was extended to the physically and mentally handicapped. In 1974, non-native speakers of English were included. Within SBA’s 8(a) program, the original definition for the purposes of classification had been “Negroes, Spanish-speaking, Indians, Eskimos and Aleuts” but, at least potentially, members of all races could benefit provided they were

“deprived.”<sup>58</sup> In 1979, the program was expanded to include “Asian Pacific Americans.” In the 1980s the SBA accepted petitions from representatives of the following groups for inclusion within the 8(a) program: (East) Indians, Sri Lankans, Tonganese, Indonesians, Nepalese, and natives of Bhutan. It rejected petitions from Hassidic Jews, women, disabled veterans, Iranians and Afghans.<sup>59</sup>

The inclusion of others besides African-Americans within the remit of affirmative action programs led to problems of justification for affirmative action. In the Congressional debates over the Philadelphia plan, it was clear that it was intended as part of a package of civil rights programs designed to accommodate African-Americans within the mainstream. References to the threat of riots were used as justifications in the 1969 debate. In the debate surrounding the Hawkins bill (HR1746) in 1971, reference was made only to affirmative action programs’ effects on *black* employment. With the new affected classes added, affirmative action moved out of the package of measures designed to resolve a racial crisis. The logic that had justified programs like these in the first place could not justify the growing number and scope of these policies.

Affirmative action first existed within what Gareth Davies has called “liberal individualism.”<sup>60</sup> It existed to compensate for flaws and omissions that did not permit African Americans to participate within the mainstream of the United States economy. As such, early affirmative action was “Keynesian” in that it was a government policy that attempted to oil the wheels of the system, rather than replace it. As Johnson insisted in 1966, “...we know that no national government action, however enlightened, can by itself change the conditions of Negro life in America.” He instead considered his policy initiatives as “rededications to age-old American values.”<sup>61</sup> The American Creed

still existed within the hearts and minds of many Americans; affirmative action's purpose was, originally, to make this creed a reality within the African-American community. However, if, as Davies characterised it, Johnson's final three years of office saw "an increasingly desperate salvage operation aimed at keeping afloat a liberal creed transformed by the politics of race," this creed sank beneath the surface when Nixon took office.<sup>62</sup>

Affirmative action, though originally designed to augment and strengthen the liberal creed, played a role in undermining it. The rapid expansion of affirmative action programs might stand as an empirical demonstration of the legitimization crisis pointed out by Habermas. With the imposition of an affirmative action program in the federal civil service, the practices and rules that the civil service had followed for nearly one hundred years were replaced. Efficiency and Weberian rationality were the watchwords of the servants of the public. Hiring was to be done on merit (as required by the Civil Service Act of 1883) and what has been called the "doctrine of privilege" governed, meaning that it was a privilege to work in public service and, generally, employment rights should not apply. With the affirmative action imperative, the tradition of hiring by merit was thrown into question, as managers had to balance new priorities with old.<sup>63</sup> Affirmative action also imperilled the traditional management prerogative to make decisions over whom to hire and fire. Even American law came into question, both because of affirmative action's fairly blatant circumvention of the strictures against quotas in the 1964 Civil Rights Act but, more broadly, because legislative remedies had failed to guarantee equal opportunities for African-Americans. Both sides of the debate today appeal to "higher law" as well as to the statute books.

With the expansion of affirmative action programs to include women and other categories of minorities, it became separated from its original justification of fulfilling the democratic promise for African-Americans. As such, it had undermined its own *raison d'être*. The programs existed with no real philosophical basis, hiding within the shadow cast by now extinct Great society programs. Some new justification for the policies – a new philosophy that could replace or reinforce many of the democratic features of liberal individualism – was needed.

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<sup>1</sup> Robert Gruenberg, "Dixie Hate in Yankee Suburbs," *Nation*, (January 16 1959), 47-50.

<sup>2</sup> Both Kennedy and Rockefeller are cited in David Danzig, "The Meaning of Negro Strategy," *Commentary*, Vol. 37, No. 2, (February 1964), 41-46.

<sup>3</sup> Cited in Gabriel Chin, "Series Introduction" in Gabriel Chin, ed., Gabriel, "Series Introduction," *Affirmative Action Before Constitutional Law, 1964-1977* (London: Garland Publishing, Inc., 1998), x.

<sup>4</sup> Dan Carter, *The Politics of Rage: George Wallace, the Origins of the New Conservatism, and the Transformation of American Politics* (London: Simon and Schuster, 1995), 207.

<sup>5</sup> "Liberalism and the Negro: A Round-Table Discussion," James Baldwin, Nathan Glazer, Sidney Hook, Gunnar Myrdal, *Commentary*, (March 1964), No. 3, Vol. 37, 25-42, 33.

<sup>6</sup> See Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960-1972* (Oxford University Press, 1990), 278-297.

<sup>7</sup> Norman Vieira, Vieira, Norman, "Racial Imbalance, Black Separatism and Permissible Classification by Race," *Michigan Law Review*, Vol. 67 (June 1969), 1603-1618, 1613. Vieira also objected on the contradiction to individualism: "A decision upholding a benevolent quota... would imply that there are important differences between the races, apparent if not real, and that those differences are sufficient to justify government action, which perforce must be described as racially discriminatory..." He also repeated objections that would be heard later regarding competition between ethnic groups: "And even when the quota remains 'benevolent,' it is likely to operate at the expense of another group which has essentially the same needs. A system so administered seems certain to be highly divisive and would dilute the political strength of all minority groups by placing their interests in sharp conflict" (1614).

<sup>8</sup> Cited in Lionel Lokos, *The New Racism: Reverse Discrimination in America* (New Rochelle, NY: Arlington House, 1971), 14.

<sup>9</sup> "Philadelphia Plan Assailed As Masking Rights Retreat," *AFL-CIO News*, (January 17 1970), 3.

<sup>10</sup> "Chicago Minorities Pact Hailed as Pattern-Setter," *AFL-CIO News*, (January 17 1970), 1.

<sup>11</sup> *AFL-CIO News* was clearly underwhelmed by the news, despite the implications for its members. A report of the changes was buried within the weekly paper, amidst articles like "Four Rail Shopcrafts Resume Bargaining" and "Prefab Firm to Recruit, Train 100 Carpenters." (February 7 1970), 2.

<sup>12</sup> Macklin Fleming, Louis Pollak, "The black quota at Yale Law School," *The Public Interest*, No. 19. (Spring 1970), 44-52.

<sup>13</sup> It is interesting to note that Nixon explicitly approved this conception when he asked his staff to find \$100 million for black colleges (see Chapter 8.)

<sup>14</sup> Fleming, "The black quota at Yale Law School," 46.

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- <sup>15</sup> Fleming, "The black quota at Yale Law School," 47.
- <sup>16</sup> Pollak, "The black quota at Yale Law School," 51. John Aubrey Douglass has argued that the University of California had a "Master Plan" in place in 1960 with the aim of admitting students from a broad range of California society. See John Aubrey Douglass, "Anatomy of a Conflict: The making and unmaking of affirmative action at the University of California," *American Behavioural Scientist*, Vol. 41, No. 7 (April 1998), 938-959.
- <sup>17</sup> cited in John Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (London: University of Chicago Press, 1996), ix/x.
- <sup>18</sup> In 1970 and 1971, for instance, the terms "affirmative action" or "quotas" did not attract enough attention to merit an index category in the *New York Times*.
- <sup>19</sup> Lokos's 1971 journalistic effort highlighting the deleterious effects of what he termed "the new racism," which included a diatribe against the Philadelphia plan, indicated that the discussion did at least exist. However, most of the book attacked black separatism; affirmative action programs only on a few pages of this needlessly lengthy book. Lokos's book reflected the Jewish-black antagonisms in New York City of which more will be highlighted later in this chapter. See *The New Racism*. Though Glazer addressed the issue of whether results in equal employment have now become more significant, he did not single out affirmative action, preferring to comment on all aspects of the Civil Rights Commission Report. As such, though he repeated claims he later makes against affirmative action, he did not really separate the policy from any of the other civil rights policies of the Nixon administration. See Nathan Glazer, "A breakdown in civil rights enforcement?" in *The Public Interest*, Spring 1971, 106-115.
- <sup>20</sup> See Arthur Fletcher, *The Silent Sell-Out: Government Betrayal of Blacks to the Craft Unions* (New York: The Third Press, 1974).
- <sup>21</sup> Memo for the Staff Secretary from Colson July 26 1971, Box 3, WHCF: Subject Files HU [Ex] HU, NPMP.
- <sup>22</sup> Colson to President re: Arthur Fletcher 6/25/71, Meetings/Phone Conversations with President: CWC's notes - Mtg. With the President [2 of 2], Box 3: WHSF: SMOF: Colson, NPMP. In a *Memo to the President from Colson*, dated June 26 1971, Colson hoped that Nixon would soon fire Fletcher: "When the Fletcher move takes place, it will be extremely well received." (Meetings/Phone Conversations with President, Box 3, WHSF: SMOF: Colson, NPMP.)
- <sup>23</sup> "Rate of Job Growth Remains Sluggish," *New York Times*. By 1974, unemployment amongst construction workers had skyrocketed to 12.4 percent.
- <sup>24</sup> Transcript of Whitney M. Young, Jr.'s press conference at the White House, Dec. 22 1970, Folder 5: White House -- Nixon, Richard, Dec. 1970, Nov. 1971 (1 of 3), Box 328, National Urban League Manuscripts (hereafter NUL Manuscripts), Library of Congress, Washington DC.
- <sup>25</sup> White House news survey copy, [Presidential Mtg. Notes 7 of 8], Box 17, WHSF: SMOF: Colson, NPMP.
- <sup>26</sup> Lokos, *The New Racism*, 333, 274.
- <sup>27</sup> Copy of *On Quotas and Affirmative Action* - speech given by Leonard Garment October 6 1972, On Quotas and Affirmative Action Oct. 6 1972 [2], Box 30 - Speeches and Meetings, WHCF: SMOF: Garment, NPMP. This policy operated throughout most elite universities during the first four decades of this century. See also Leonard Garment, *Crazy Rhythm: My Journey From Brooklyn, Jazz, and Wall Street to Nixon's White House, Watergate, and Beyond* (New York: Times Books, 1997), 33.
- <sup>28</sup> Lionel Lokos is perhaps the best northern representative of this sort of view.
- <sup>29</sup> Fleming, "The black quota at Yale Law School," 49.
- <sup>30</sup> Stephen Steinberg, "How Quotas Began," *Commentary*, September 1971, 68-76. Steinberg was horrified when his arguments were used later to attack quotas. He insisted he was really dealing with the early quotas controlling numbers of Jews in educational institutions. See the letters pages of *Commentary*, December 1971 (10, 11). Steinberg has become an ardent defender of affirmative action policies more recently. See Steinberg, *Turning Back*.
- <sup>31</sup> Earl Raab, "Quotas by Any Other Name," *Commentary* 54:1 (January 1972), 41-45. Elliot Abrams, "The Quota Commission," *Commentary* 54:4 (October 1972), 54-57.
- <sup>32</sup> For a comprehensive record of the *Griggs* decision, see <http://caselaw.findlaw.com/scripts/getcase.pl?navby=case&court=US&vol=401&page=424>.



- <sup>33</sup> Cited in Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (London: Harvard University Press, 1987), 60.
- <sup>34</sup> Glazer, *Affirmative Discrimination*, 35.
- <sup>35</sup> Peter Kihss "Study Says Minorities Are Key To Election" *New York Times*, May 7 1972, copy contained in folder marked Ethnic Studies [1 of 2][CFOA 928], Box 83, WHCF: SMOF: Garment, NPMP.
- <sup>36</sup> Harris Public Opinion Analysis, October 12 1972 in Presidential Meetings and Conversations - September 28, [6 of 6], Box 18, WHSF: SMOF: Colson, NPMP.
- <sup>37</sup> "The Quotas Controversy," edit., *New Republic*, Vol. 167, No. 15, (October 21 1972), 9-10.
- <sup>38</sup> Byron Shafer, *Quiet Revolution: The Struggle for the Democratic Party and the Shaping of Post-Reform Politics* (New York: Russell Sage Foundation, 1983), 161-178.
- <sup>39</sup> Memo for the President from Colson, May 19 1972, Presidential Mtg. Notes [2 of 8], Box 16, WHSF: SMOF: Colson, NPMP.
- <sup>40</sup> Entire sections, containing boxes of material, of Leonard Garment's files, for instance, are dedicated to busing. Nixon created a "busing roadshow" in order to get his position over in the run-up to the 1972 election. As Colson stated confidently to Nixon, "Busing [is] clearly the most important issue as everyone has observed..." (Memo for the President from Colson, May 19 1972, Presidential Mtg. Notes [2 of 8], Box 16, WHSF: SMOF: Colson, NPMP.)
- <sup>41</sup> "The Quotas Controversy," *New Republic*.
- <sup>42</sup> David H. Rosenbloom, "Equal Employment Opportunity: Another Strategy," *Personnel Administration/Public Personnel Review*, Vol.1, No.1, (July/August 1972), 38-41, 38.
- <sup>43</sup> For a useful delineation of conservative and liberal staff members, see Memo for Ehrlichman from Edward L. Morgan, August 12 1970. Morgan suggested holding tri-weekly meetings with Jerris Leonard, Robert Mardian, Pottinger and Harry Dent on desegregation. Morgan warned his boss, "Keeping Finch, Shultz, Moynihan and Garment out will be tough, but I think we should in this area, as the President can probably best stay one jump ahead if we can keep them one jump behind." On his copy of the memo, Nixon wrote: "I agree." (President's Handwriting, August 1 thru 15, 1970, Box 7, WHSF: SMOF: POF, Contested Files, NPMP.)
- <sup>44</sup> cited in Dr. George C. Roche III, "On Campus: 'An Iceberg of Government Intervention,'" *US News and World Report*, Jan 1 1973 44 - 48, 45, contained in [Ex] HU 2 1972 Onwards, Box 4, WHCF: Subject Files: HU (Human Rights), NPMP.
- <sup>45</sup> "The Quotas Controversy," *New Republic*.
- <sup>46</sup> The report was issued October 2 1972. Cited in Glazer, *Affirmative Discrimination*, 215.
- <sup>47</sup> United States Commission on Civil Rights, *Affirmative Action in Higher Education: A Consultation Held in Washington DC, September 9-10, 1975* (Washington DC: General Printing Office, 1976), 202.
- <sup>48</sup> Paul Dealney, "US is Spurring Efforts to Fight Job Prejudice," *New York Times*, January 19 1974, 43.
- <sup>49</sup> figures from Glazer, *Affirmative Discrimination*, 227.
- <sup>50</sup> Herman Belz, *Equality Transformed: A Quarter-Century of Affirmative Action* (London: Transaction Publishers, 1992), 82-83.
- <sup>51</sup> Marilyn Bender, "Job Discrimination: Ten Years Later," *New York Times*, November 10 1974, III, 1.
- <sup>52</sup> Hugh Davis Graham, "Civil Rights Policy in the Carter Presidency" in Gary M. Fink and Hugh Davis Graham, *The Carter Presidency: Policy Choices in the Post-New Deal Era* (Lawrence, Kansas: University Press of Kansas, 1998) 202-223, 212.
- <sup>53</sup> Memo from Ken Cole to Anne Armstrong, July 2 1973, Box 5 [Ex] HU2 6/1/73 - 9/30/73 and [Gen] HU2 4/7/69-4/30/69; WHCF: Subject Files: HU (Human Rights), NPMP.
- <sup>54</sup> The Ford Library has an excellent searchable web-site at [www.lbjlib.utexas.edu/ford](http://www.lbjlib.utexas.edu/ford). See Cabinet Meeting Minutes, June 25 1975.
- <sup>55</sup> Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 160.
- <sup>56</sup> Despite the fact that various groups were often mentioned in literature on civil rights, African-Americans – even before the riots – were the real subject being discussed. For example, James P. Mitchell, Secretary of Labor and Vice-Chairman of the Eisenhower's President's Committee on Government Contracts, stated to the committee "Now I would like to discuss the Negro alone for a moment. We are accustomed to talk in this vague term of minority groups but in America the overriding real problem is the discrimination that exists in employment against Negroes." *Youth Training - Incentives Conference Proceedings*, The

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President's Committee on Government Contracts (Washington DC, United States General Printing Office, April 1957).

<sup>57</sup> M. Barta, *Minority Report*, "The representation of Poles, Italians, Latins and Blacks in the executive suites of Chicago's largest corporations," prepared by The Institute Of Urban Life For The National Center For Urban Ethnic Affairs, copy in Box 18, WHCF: Subject Files: HU (Human Rights), [Ex] HU2-2 Employment, [Gen], NPMP. See also Skrentny, "Affirmative Action: Some advice for the pundits," 882.

<sup>58</sup> Anonymous memo to Mr. Terrence M. Scanlon, Office of Minority Business dated 15 December 1969, Equal Employment Opportunities Commission (EEOC) – 1970 [2 of 2][CFOA 7730], Garment: Alpha Subject Files, Box 35, WHSF: SMOF: Garment, NPMP.

<sup>59</sup> See Graham, "Unintended Consequences," 905.

<sup>60</sup> See Gareth Davies, *From Opportunity to Entitlement: The Transformation and Decline of Great Society Liberalism* (Lawrence, Kansas: University Press of Kansas, 1996). Skrentny makes a similar (if slightly inaccurate) point about the appearance of the term in Kennedy's 1961 Executive Order: "In civil rights, the term *affirmative action* first appeared in President John F. Kennedy's Executive Order 10925, wedded to this color-blind view of the world." Skrentny, *Ironies of Affirmative Action*, 7.

<sup>61</sup> cited in Davies, *From Opportunity to Entitlement*, 129, 113.

<sup>62</sup> Davies, *From Opportunity to Entitlement*, 71.

<sup>63</sup> For background into the crisis besetting American public administrators, see Vincent Ostrom, *The Intellectual Crisis in American Public Administration* (University, Alabama: University of Alabama Press, 1974), 3-19. Waldo is cited on page 10.

## Chapter 11

# THE PHILOSOPHICAL CONTRIBUTION TO AFFIRMATIVE ACTION: RAWLS AND ZERO-GROWTH

### A Theory of Justice

In 1971, John Rawls' published *A Theory of Justice*. An enormously influential book, it attracted a flood of criticisms, comments and praise after its publication. When first published, the book received favourable reviews in the *New York Review of Books*, the *New York Times Book Review*, the *Economist*, the *Spectator*, *Nation*, *Washington Post*, *The Times Literary Supplement* and others. Disputes about the various building blocs that Rawls erected rumbled on in the pages of various philosophical and journals. The *American Political Science Review* printed seven lengthy reviews alone. Yet even those reviewers that were critical of Rawls agreed upon its monumental importance. James Fishkin and Peter Laslett noted that Isaiah Berlin's assertion in 1962 that no commanding work of political theory has appeared in the 20<sup>th</sup> century was no longer true in 1971.<sup>1</sup>

Rawls' theory's central importance to the emergence of affirmative action lies in its explication of a new framework of values that replaced traditional values and mores that, at the end of the 1960s, had lost their salience. Many facets of the American Creed, or liberal individualism, were simply no longer operable as legitimating devices. Rawls' project, as he characteristically admitted,<sup>2</sup> was to recreate a basis upon which liberalism might provide a stable order. Within the book, the most important discussion

in relation to legitimating affirmative action is undoubtedly his treatment of the problem of equality of opportunity. Having said that, it is necessary to understand Rawls' book within the historical period in which it appeared. Had it remained an obscure academic work, there would be little reason to study it; the question of why this work became so popular and widely discussed is more important for the purposes of this study than any that Rawls discusses. For, although Rawls advances an interesting, well-argued and sophisticated philosophical theory, its popularity is less a renewed interest in obscure philosophical discussions than a manifestation of the need for a new philosophical framework for liberalism.

An historical appreciation of the arguments is appropriate because the book is a complex synthesis of twenty years of philosophical development. Rawls deals with many topics and leaves many questions – purposefully, it sometimes appears – open ended in a way that has created vast amounts of material dedicated simply to clarifying the meaning of many aspects of the theory. As Robert Wolff observed, the “labyrinthine complexities” of Rawls' book reflect his initial idea for a simple, coherent, and relatively straightforward answer to a basic question, and developed around responses to his initial answer since the 1950s.<sup>3</sup> Large sections of the book concentrate on very specific difficulties; as such, the structure of the book is quite difficult to follow. Rawls incorporates discussions of many different intellectual traditions, including economic “games theory,” ideal utilitarianism, contractarianism, and intuitionism into the book. Key aspects of the theory evolved at different times, though.

The philosophical problem with which Rawls engages in lay in an impasse between two schools of philosophical thought, which also appear to have influenced by

historical problems, even if those who put them forward fail to acknowledge any sort of historical influence. Utilitarianism – the greatest good for the greatest number – ran into the difficulty that, according to the theory, it was right to sacrifice the good of one often for the good of many. Such a theory sat uncomfortably in a liberal individualist polity, especially at a time when communism might legitimately claim to be the heir of utilitarian thinking. Furthermore, by reducing individuals to simple receptacles of happiness, utilitarianism denied that any moral purpose might unite a society or that individual morality had any real role to play. Intuitionism asserts that each person has a power of moral intuition that is essentially rational. It holds that the right is independent of the good, and makes rightness a fundamental, irreducibly moral conception. Intuitionism, however, is in many ways a mere expression of conviction; if two people have different moral intuitions, intuitionism has no answer. It can be observed that intuitionism might have looked problematic when the moral rightness of capitalism (and, in particular, anticommunism) came into question in the McCarthyite era of American history.<sup>4</sup>

That Rawls attempted to resolve these problems sets him apart from other philosophers in the twentieth century, who as Kukathas and Pettit note, were “loath to present themselves as defenders of any particular values.”<sup>5</sup> It also moved in the direction of resolving a similar question expressed in political theory, the divide between existing conceptions of that is politically feasible, on the one hand, with what is politically desirable, on the other. Such a bridge might have helped bring together academic disciplines that had long developed progressive demarcations between their respective professional spheres such as economics, political science and philosophy. Gene Blocker

and Elizabeth Smith observe that “Rawls’ work can be seen as a way of relieving a major political schism of our time, one which separates the libertarian right from the egalitarian left.” They note that, in law, Rawls’ theory helped resolve a dispute between legal positivism and those arguing for a natural rights/natural law conception. “Like Kant, Rawls stands as the man in the middle, a mediator of many longstanding disputes.”<sup>6</sup> The immodesty of Rawls’ theoretical project (though Rawls himself made less grand claims for his theories than have other writers), with its attempt to resolve so many problematic divisions as well as provide a basis for political action, is perhaps its greatest strength.<sup>7</sup>

Rawls’ solution to the problem became the heart of his book, a brilliantly simple, elegant, formal manoeuvre, “one of the loveliest ideas in the history of social and political theory,” as Wolff, a trenchant critic, puts it.<sup>8</sup> Rawls constructs a formal model of a society populated with rational, self-interested persons that would choose the way in which their society would organise. Called the “original position” (and self-consciously referring to Rousseau’s “initial situation”), Rawls posited that these individuals would, if they were rationally self-interested, unanimously choose a set of principles from which institutions and practices within which the players interact might be evaluated. Once they agreed those principles, Rawls added to the rules of the game, they will have to abide by those principles. His concern is to derive principles of justice from this formal model that might stand as the basis to a just society.<sup>9</sup>

In its original appearance, in Rawls’ 1958 essay, “Justice as Fairness,”<sup>10</sup> Rawls derived two principles of justice from this model. The first was that “each person participating in a practice, of affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all.” The second, which would be changed in

later versions, was that “inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone’s advantage, and provided the positions and office to which they attach, or from which they may be gained, are open to all.”<sup>11</sup> The principles are “lexically” ordered; the first was prior to the second. Rawls used the expectations of the “representative man” to judge whether an inequality was legitimate; the representative man must believe that an unequal distribution works to his advantages. In other words, if there were a dispute over the rules within, say, a game of baseball, representatives might be made up of pitcher, infielder, outfielder, and catcher, who represented the various different positions within the game. In order to decide the efficacy of the rules, these four players could fairly represent the views of most players. For Rawls, in this version of his theory, inequalities in the benefits accruing to different position must be in the interest of every party participating.<sup>12</sup> Rawls claimed that the principles were at the same time an accurate reconstruction of our settled moral convictions *and* the solution to the bargaining game. It is interesting to note that this version strongly supports the principle of equal opportunity that existed at the time of publication.<sup>13</sup>

The next version of the theory appeared 1967, a date of crucial importance in understanding the influences upon Rawls, as “Distributive Justice.”<sup>14</sup> He made two revisions to his theory. First, Rawls dealt with a difficulty that arose from the first version of his theory. The players of the game within the original position, if they knew too much about their own situations, may not have agreed with Rawls’ outcome, particularly if they counted themselves as amongst the top of the social strata. Rawls created the “veil of ignorance,” whereby “no one knows his position in society, nor even his place in the

distribution of natural talents and abilities,” in order to rid his theory of justice of “bargaining problems which arise in everyday life from the possession of this knowledge” that might affect the choice of the players. The second revision – extremely important for a justification of affirmative action – was a change in the second principle of justice. Instead of justifying inequalities by their acceptability to everyone playing the game – or of representative man, inequalities had now to be justified by their acceptability to the “representative man of those who are least favored by the system of institutional inequalities.”<sup>15</sup> This new conception has been referred to at various times and by various people the “difference principle” and the “maximin” conception of justice. Additionally, however, some less obvious changes occurred between the versions. Whereas Rawls appeared to be dealing with small-scale institutions – implied in the baseball metaphor – in the new article Rawls asks the question of “whether it is possible to arrange the institutions of a constitutional democracy so that the two principles of justice are satisfied, at least approximately.”<sup>16</sup>

As Ian Shapiro has noted, Rawls downplayed the difference between his original model and this new conception of his theory of justice.<sup>17</sup> In Rawls’ terms, pointing out the problems with the “Pareto-optimal” justification for inequalities in his first version of events would “only show what we knew all along,” namely that the efficiency of a system and a high degree of equality of opportunity did not guarantee justice.<sup>18</sup> Yet the implication of the changes are large. John Schaar observed in 1975 that “Rawls proposed a basic shift in our operative definition of equality.”<sup>19</sup> Equality of opportunity, in the past, made real the primary liberal tenet that the individual is the basic unit of society. It justified inequality within capitalism by holding aloft the possibility



that all individuals have equal chances to hold offices and positions within society.

Schaar pointed out that:

Up until a few years ago, this understanding of equality as equality of opportunity reigned virtually unchallenged. It is still by far and away the dominant conception of equality in the public mind and the dominant conception employed in the making of public policy. Today, however, in some quarters the principle has come under attack. Far from being a remedy for inequality, and thus a move toward justice, the principle is held to be the fountain of new kinds of inequality, and thus a move toward injustice. Some writers are arguing that equality of opportunity should be replaced by equality of expectations, or even equality of results. John Rawls agrees with much of this criticism, and proposes that the liberal principle of equal opportunity must, as a requirement of justice, be replaced by a new understanding of “fair equality of opportunity.”<sup>20</sup>

The importance of this shift should not be glossed over. Affirmative action was justified within the original conception of equality of opportunity only as a contingent, temporary measure. Rawls incorporated the old within a new system that would, he hoped, please all “by combining the principle of fair equality of opportunity with the difference principle.”<sup>21</sup> The first definition of equality of opportunity could be preserved (instead of entirely annihilated, as more radical commentators might have wished) to provide a continuity but superseded by the difference principle in order to fulfil its own mission in forwarding what Myrdal referred to as “the general process toward economic democratization in our society.”<sup>22</sup>

The third form of Rawls’ model appeared with the publication of his theory in the book, *A Theory of Justice*, in 1971. One striking difference between the 1967 version of the theory and the book version is the new conception of “primary goods,” which Rawls defines as “rights and liberties, opportunities and powers, income and wealth.”<sup>23</sup> In the 1967 article, Rawls had dealt with the problem of distribution

entirely within economic terms. Now, however, Rawls stated that “perhaps the most important primary good is that of self-respect,” because:

Without it nothing may seem worth doing or if some things have value for us, we lack the will to strive for them. All desire and activity becomes empty and vain, and we sink into apathy and cynicism. Therefore, the parties [Rawls had by then also dropped reference to “players”] in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect.<sup>24</sup>

Rawls also adds stipulations to the “veil of ignorance.” All parties in the original position know much more about the general situation than they did in previous versions. In particular, they must assume that their society needs a system of justice – “moderate scarcity” is assumed so that the players cannot imagine that, with endless abundance, no system of justice would be necessary. Rawls also has them “understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology.”<sup>25</sup> The parties in the original position would choose the maximin rule first, there are only a few alternatives, as Rawls omits, for example, any form of libertarianism,<sup>26</sup> principles requiring distribution according to need, and desert-based conceptions of justice; second, Rawls stipulates that “the person cares very little if anything, for what he might gain above the minimum stipend that he can, in fact, be sure of by following the maximin rule. It is not worthwhile for him to take a chance for the sake of further advantage, especially when it may turn out that he loses much that is important to him... The situation involves grave risks.”<sup>27</sup> This much-modified process, whereby the parties of the original position pick the difference principle, is perhaps the most criticised of Rawls’ formulations.<sup>28</sup> However, Rawls made no claim to have derived the choice made by original position parties from their characteristics. Instead, he has, as he admits, made the stipulations conform as closely as

possible with the desired result of the maximin principle: “We want to define the original position so that we get the desired solution...”<sup>29</sup>

The result – if we accept Rawls’ qualifications – is that the reader chooses the two principles of justice Rawls proposes. A finished version of them is contained nearly halfway through *A Theory of Justice*:

*First Principle*

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

*Second Principle*

Social and economic inequalities are to be arranged so that they are both:

- a) to the greatest benefit of the least advantaged, ...and
- b) attached to offices and positions open to all under conditions of fair equality of opportunity.<sup>30</sup>

They are, as in the first model, lexically ordered so that the first precedes the second and (b) precedes (a) within the second. Any social institution or practice can be fairly easily evaluated by asking whether it fit these criteria, eliminating lengthy contestations about the fairest forms of institutions. Because of the way the principles of justice are chosen, they are not up for debate; any rational, self-interested person would choose these principles, as Rawls asserted.

## Responses to Rawls

Scholarship has tended to concentrate on criticising Rawls from either a left or right perspective (along with those from the less easily-categorised communitarian tradition) but many criticisms are common to both, particularly those that deal with the

structure of the theory. One of the key problems, it has been pointed out, is that Rawls ignores any questions of production.<sup>31</sup> Myriad problems with the original position have been pointed out, especially the difficulty that the parties of the original position know little about themselves yet have “life plans” (presumably they don’t know what they want but they know how to get it!) and very sophisticated knowledge about human psychology, economic theory and a developed sense of justice. The “veil of ignorance” is uneven, to say the least.<sup>32</sup> Rawls, as others pointed out, constructed his theory so it would fit intuitively with the existing liberal democratic conceptions, from the result to the method, as he admitted.<sup>33</sup>

However, much of the criticism directed from political perspectives misses the point. From the left, the complaint is that Rawls is simply bolstering the liberal status quo.<sup>34</sup> This is true, to an extent, but misses the important point that his model of justice changes fundamentally the existing legitimation for the liberal status quo, providing something qualitatively new. Conservatives picked up on this point and accused Rawls of undermining traditional conceptions of rights, notions of equality of opportunity and merit.<sup>35</sup> However, these conservatives only pointed instead to principles from the past that had failed. The equality of opportunity they championed did not incorporate African-Americans. Any restatement of these principles would have to address this fundamental flaw and propose some answer to this basic difficulty. In any case, libertarian thinking, by the time that Rawls finished his book, had become counterintuitive in the eyes of most Americans.<sup>36</sup> Like a philosophical version of Franklin Roosevelt (though, of course, in a very different way) Rawls can be seen as doing conservatives a favour despite their

antagonism to him. Rawls attempted to save the existing system by propping up badly discredited ideological premises.

It makes most sense to see Rawls within the historical context within which his theory was developed and made a huge impact on the way a large section of the intelligentsia understood social and political issue. In terms of its development, Rawls no doubt saw the changes he made to his theory of justice as simply refinement of his original argument. Yet the historical events of the period between 1958, when the first article appeared, and 1967, when the difference principle made its entrance, cast a large shadow over his theory. The essential historical background (though one that Rawls fails to mention)<sup>37</sup> was the apparent contradiction between the individualist conception of the principle of equality of opportunity and the need for American society to extend special measures that treated African-Americans as a group (even if only to achieve the original conception of equality of opportunity for all). Logically, if these special measures were temporary measures designed to incorporate blacks within the mainstream, giving them real equality of opportunity as individuals, the attempts made by the Johnson administration should have tapered off. Instead, as we have seen, these special measures increased and expanded to meet the demands of other groups in American society. The difference principle justified this differential treatment by insisting that, in a just society, the least advantaged members of society should receive, as it were, unequal treatment in order to further the equality of society in general.

Besides reflecting and effectively explicating the problems, Rawls created the basis for the legitimation of an entire swathe of government intervention and expansion by removing questions of its existence from the political sphere. It is a moot

point whether Rawls' theory specifically supports specifically affirmative action. Many critics from the right assert that the difference principle effectively legitimates quotas. Bell cites Rawls' principle of "redress" as legitimating quotas: "The idea is to redress the idea of bias of contingencies in the direction of equality. In pursuit of this principle greater resources might be spent on the education of the less intelligent, at least over a certain time of life, say the earlier years of school."<sup>38</sup> Schaeffer feels that Rawls, by using this idea of "redemptive equality," contributes to quotas: "One can find many examples of redemptive egalitarianism in contemporary American political thought and practice ...in so-called affirmative action programs that require persons to be educated and hired according to racial and sexual quotas..."<sup>39</sup> Some from the left – criticising Rawls – indicated that privileging liberty in the order of the two principles of justice precluded any affirmative action programs.<sup>40</sup> From a pro-affirmative action stance, Hardy Jones replied that affirmative action represented an inequality that could be justified by the principles of justice.<sup>41</sup> Alan H. Goldman and Robert K. Fullinwider both published books on the legitimacy of affirmative action using a Rawlsian contractarian approach to ethics. Both accept that group discrimination, under Rawls' terms, is impermissible, but Fullinwider accepts the validity of affirmative action programs whereas Goldman, while accepting affirmative action to assist individuals, rejects it on all other counts.<sup>42</sup>

Of course, Rawls fails to give any specific guidance as to whether his theory supports affirmative action programs. Discussants might argue and, like a seminary, cite scripture and verse to support one particular interpretation or another. The most important aspect of Rawls, however, is not is rigidly ordered system that privileges rights ahead of redressing inequalities. If looked at as a particular response to historically

specific problems, the first principle merely signals that there is to be continuity with the traditions, both formal and informal, of the past. The important new aspect is the difference principle, which attempts to marry traditional conceptions of equality of opportunity with radical critiques of the liberal individualist conception. In this sense, it has an important legitimating function in its *incorporation* of the radical critique within the existing conceptions of justice and equality. By providing a model of equal opportunity that legitimates a societal ordering around the needs of the least well-off, it broadly supports the idea behind affirmative action and allows it to move away from the original justification as a temporary aberration from the liberal individualist aims of civil rights measures. Rawls, in theory, at least, resolved the schism between the rapid growth of programs and aims of affirmative action programs and their conceptual attachment to the black civil rights imperative of integration.<sup>43</sup>

Another historical difficulty to which Rawls suggests an answer was the apparent stasis within the political sphere in dealing with the problem of civil rights. Johnson had wrestled with the fact that from 1966 onwards the American electorate was hopelessly divided on the need for new policies. A vociferous minority demanded more effective civil rights programs whereas much of the white majority refused to back further civil rights measures. Rawls moved the problem from the problematic political sphere into the realm of the purely administrative. The contradiction lies between commitment to majoritarian democracy on the one hand and the need for measures to create a just (and thus stable) democracy on the other. The difference principle simply takes the question of distributive justice out of the hands of the majority. Rawls notes a problem in utilitarianism whereby a large part of society has an irrational abhorrence of

certain harmless religious or sexual practices, for which we might substitute the irrational racial prejudices of large percentages of white Americans towards African-Americans. Rawls notes that, with a utilitarian perspective, there is nothing to be done about prejudice: "Even when these attitudes are unsupportable on moral grounds, there seems to be no sure way to exclude them as irrational. Seeking the greatest satisfaction of desire may, then, justify harsh repressive measures against actions that cause no social injury." In justice as fairness, however, "this problem never arises. The intense convictions of the majority, if they are indeed mere preferences without any foundation in the principles of justice antecedently established, have no weight to begin with. ...To have a complaint against the conduct and belief of others we must show that their actions injure us, or that the institutions that authorize what they do treat us unfairly."<sup>44</sup> Rawls thus proposes a compromise between the American democratic heritage and the civil rights imperative. The democratic heritage and the rights of citizens are preserved under the first principle but, under the difference principle, programs that redistribute "goods" can be protected against the will of the majority, if necessary.

## Rawls and public policy

*A Theory of Justice*, of course, only suggested an alternative philosophical basis upon which choices between institutional arrangements might be made. Evidenced by the reams of material arguing over many of the points the book made, as many questions as answers are provided by the book. Yet, almost immediately after its publication, Rawls' theory was used to justify and make sense of real issues happening



within American government. Many public administrators, for example, had grave doubts about the operating principles they had followed for some time and some fairly leapt upon Rawls' theory. H. George Fredrickson noted that, in the existing crisis, public administrators had to take on a more activist role in redistributing resources in order to preserve the status quo:

Pluralistic government systematically discriminates in favor of established stable bureaucracies and their specialized minority clientele ...and against those minorities ... who lack political and economic resources. The continuation of widespread poverty, disease, ignorance, and hopelessness in an era of unprecedented economic growth is the result. This condition is morally reprehensible and if left unchanged constitutes a fundamental, if long-range, threat to the viability of this or any other political system. Continued deprivation amid plenty breed widespread militancy, and so forth. A Public Administration which fails to work for changes which try to redress the deprivation of minorities will likely be eventually used to repress those minorities.<sup>45</sup>

Not happy with the prospect of repressing potentially militant minorities, public administrators grasped Rawls' *A Theory of Justice* when it appeared.<sup>46</sup> Rawls' paradigm allowed them to create an administrative framework without waiting for a mandate from the electorate. The permanent feature that would give them decision-making apparatus was the difference principle, beyond the reach of the potentially irrational American people. In a symposium arranged by the *Public Administration Review* in 1974, the difference principle was translated into "social equity." An article by David K. Hart, a public administration academic from George Washington University, is worth citing at length, though not because his tone is that of the breathless excitement of a child arriving at the feet of his parents with some information he knows will interest them. Rather, it is remarkable how completely Hart transcribed Rawls' philosophical treatise into policy ethics. Hart begins:

It may well be, given the unpleasant probabilities of our future [this is,

unfortunately, not explained], that social equity is an idea “whose time is come.” That position is accepted herein and the main points to be discussed are: (1) that social equity, while most appealing, needs a fuller substantive ethical content; (2) that, because of this, its advocates have based their justifications and their prescriptions upon the extant American ethical paradigm; (3) that the extant paradigm (a) denies legitimacy to social equity but (b) is itself suffering from declining public confidence; (4) that a most promising alternative ethical paradigm has been developed by John Rawls in *A Theory of Justice*; and (5) that his theory of justice can provide a powerful ethical foundation for (a) a substantive theory of social equity and (b) for a professional code for *equitable public administrators*.<sup>47</sup>

Hart does not particularly care whether the theory stands up to rigorous philosophical scrutiny or not, for “(t)o drift is to court disaster and unless we address ourselves to conscious and pervasive value change, that drift will make disaster inevitable.” The theory is simply the best tool lying within reach: “It is in this spirit that I argue for the theory of justice developed by John Rawls, which is the *most significant alternative ethical theory available to us*.”<sup>48</sup>

This reinterpretation of the at least part of the purpose of public administration that had previously been seen as only to implement the decisions made by elected government<sup>49</sup> would prove vital for the transformation of affirmative action from an exemplary policy that hoped to bully American business and private enterprise into hiring representative percentages of minorities, that had, as we have seen, very little intention of rigorously enforcing its strictures, to a full-blown method of implementing “social equity” that extended from personnel management to contract allocations and beyond. First, administrators incorporated social equity into assessments of public administrative bodies. H. George Fredrickson noted that “Social equity, then, would be a criterion for effectiveness in public administration in the same way that efficiency, economy, productivity, and other criteria are now used.” Personnel systems would add

different criteria to their assessments of individual workers that went far beyond questions of merit: “In essence, the social equity doctrine requires a pluralistic basis for judging people rather than a monolithic one.”<sup>50</sup>

Merit, while still existing as an employment criterion, became less important in the overall scheme personnel management than social equity. Another symposium held by the Public Administration Review in 1974 raised the issue of merit, deciding that it had been contradicted and must necessarily be shunted aside in favor of social equity. The convenor of a symposium entitled “The Merit Principle Today” observed: “As you read the articles, you may be struck, as I was, by how (and for how many reasons) we have lost sight of the ideal: the best possible candidate in every job in the public service. The reasons may be good ones.”<sup>51</sup>

Perhaps the best illustration of the interpretation of Rawls into affirmative action was the “mini-symposium” on affirmative action and public employment in the same journal two months after the social equity symposium. Significantly, affirmative action was recognised by this symposium as a management technique, a method of measuring the performance of delivery of services and of individual managers in an increasingly service-oriented economy. As Catherine Lovell, taking up objections to affirmative action, observed:

Setting operational goals, and developing criteria for measurement of progress toward these goals, is much talked about these days in management theory. ... Yet goal setting, action programs, and evaluation are the *modus operandi* of affirmative action. Affirmative action demands more from organizational leaders than lack of prejudice and belief in equal opportunity; operationalizing affirmative action requires leaders to take action stances in which priorities are reordered and time and energy is allocated to affirmative action *above other goals*.<sup>52</sup>

Although this symposium dealt only with public employment, it is possible to see from this tract how affirmative action policies gained reasons for being far beyond their original remit of forcing contractors to hire more representative workforces. Rawls (who is also mentioned within the affirmative action symposium) helped to legitimate affirmative action by transforming it from the realm of civil rights enforcement to that of management science. From humble beginnings as a policy, affirmative action became the main operational tool for this new theory. It began to supplant the hallmarks of previous management science – efficiency and merit – and was soon ubiquitous not only in public but in private industry as a mark of effective personnel management, rivalling, perhaps, the scientific management techniques originated by Frederick Taylor at the turn of the century.<sup>53</sup>

### Consciousness of limits

One more intellectual trend deserves our attention for its contribution both to justifications of affirmative action and to making affirmative action a potent political issue in American society. Previously, civil rights efforts had been based on an idea of generally increasing material prosperity, on those standing on the lower rungs of the ladder of opportunity being able to move upwards. Importantly, though objections to black civil rights demands were heard from Southerners and from Northern ethnics, these objections seldom concerned employment and were more often directed at the political power that blacks appeared to wield. By the end of the 1960s, however, the assurance of continual material progress appeared not only unrealistic but, to many, even undesirable.

“The age of abundance has ended,” wrote historian David Donald, summing up the perspective of the 1970s in the *New York Times*. He saw his duty as a historian to “disenthrall” students “from the spell of history, to help them see the irrelevance of the past, ...[to] remind them to what a limited extent humans control their own destiny.”<sup>54</sup>

Perhaps the most famous expression of these new perceptions was *The Limits to Growth* but many other “no-growth society” discussions, either inspired by or responding to this book came forth around the same time, questioning the viability or even the desirability of continuous economic growth.<sup>55</sup> A group of some thirty individuals - scientists, educators, industrialists, civil servants - from ten countries met for the first time in April 1968. In early 1972 The Club of Rome, as they became known, published a report by the MIT project team. *The Limits To Growth* presented a glum picture forecasting population growth, resource depletion, food supply, capital investment and pollution in the future. They forecasted that “(t)he most probable result [of present trends] will be a rather sudden and uncontrollable decline in both population and industrial capacity” unless the world sought equilibrium and a “stationary state” where economic growth was curtailed.<sup>56</sup> The report reverberated in the newspapers and magazines when it was published, causing a plethora of alarming articles. Most leading journals were critical of the report. The *New York Times* called it “an empty, misleading work.” The *Times* of London called it “pseudo-science at its worst.”<sup>57</sup> Yet, after criticising the specifics of the book, the general point that there were limits to growth found agreement in nearly all reviews. As Rufus E. Miles, Jr., wrote, “The book’s sensational doomsday warning seemed to strike a responsive chord – almost untouched by any previous work – in the strong intuitive feelings of many thoughtful citizens that

the end of the era of dependable economic growth and high-energy affluence might be nearer than supposed by economic analysts and forecasters.”<sup>58</sup> S. Fred Singer, an economist writing in *Nation*, was amongst the most critical but agreed that “a kind of self-regulation that uses the laws of economics” was necessary. “I don’t feel as optimistic about population growth.”<sup>59</sup> Another more substantial review, published the next year, attacked the book savagely yet agreed that its impact was positive: “As a result of reading *The Limits To Growth* many people are now thinking anew about long-term problems and discussing them much more seriously. In particular, they are discussing once again whether or not the world is likely to run up against physical limits. This is a very important achievement.”<sup>60</sup>

As the critics pointed out, this perception of the limits to growth rested on three assumptions, all of them superficially correct. First, the spectacular growth in the Gross National Product occurring after WWII did not correlate to quality of life; second, the resources of the earth, upon which all prosperity is based, are finite; and third, environmental pollution was getting worse. These observations, however, might have been made at nearly any time. Nor did absence of economic growth guarantee, for instance, that resources would not be used up. Economic growth also can be used to positive effect to clear up pollution, a fact that has been demonstrated by the relative success of Western countries in the battle against pollution.<sup>61</sup> Whatever the criticisms, though, the ideas rapidly became an underlying assumption with which economists had either to agree or explain their disagreements.

Like Rawls’ book, these ideas tended to cut through the existing bipolar political structure. As Mancur Olson, wrote, “they owe nothing to the long-standing and

often tiresome controversies between left and right.”<sup>62</sup> Like Rawls, however, they tended to incorporate radical critiques of American society into their essential theory, making them effectively mainstream.

The readers to which Rawls addressed his book, he assumed, would wish to avoid “grave risk.” The entire premise of the original position – at least, after the difference principle was introduced – was that rational self-interested parties, knowing nothing about themselves, would seek the strategy that involved the least-worst scenario. However, as numerous critics have pointed out, this is clearly a pessimistic strategy. The whole way in which the term “risk” was used in Rawls would not have been recognised during John F. Kennedy’s tenure. Risk, then, was to be calculated rather than scrupulously avoided. It is just as well that Rawls no longer used small examples of situations such as baseball games. As Kukathas and Pettit point out, the maximin principle appears absurd if applied to everyday life where risks, such as driving a car, would be eliminated.<sup>63</sup> Rawls’ pessimistic perspective, then, clearly found a kindred spirit in the limits to growth theory.

Perhaps the most important assumption shared by Rawls and the limits to growth theories is that the sphere of distribution deserves more attention than the sphere of production. Again, this contrasts with past ideas about social problems that analysed distribution issues as closely related to the particular existing mode of production. As Shapiro noted, there is no reason to think that the denizens of the original position would not wish to ensure that the arrangements at which they arrived secured an appropriate mode of production even before they worried about distribution. Surely the parties would choose a mode of production that increased the wealth of all, even if the distribution

system did not follow the difference principle, rather than an inferior productive system that guaranteed that the least advantaged would be treated fairly?<sup>64</sup> Even the assumption of “moderate scarcity” or of a relatively unchanging social milieu would have been a strange – if not un-American – idea to Americans at the end of World War II or even ten years before Rawls’ book was published. The confident belief in unending economic and social progress as a natural condition of free men was almost a secular religion in the United States.

Concentration on the sphere of distribution rather than that of production plainly favours an affirmative action strategy that aims to allocate existing jobs proportionally rather than one with the broader goal of integrating black Americans within the American economic mainstream. Previously, civil rights strategies rested on the premise that, as John F. Kennedy’s famous dictum would have it, “a rising tide lifts all boats.” The “ladder of opportunity” upon which African-Americans were, according to analysts like Glazer and Moynihan in their famous book, *Beyond the Melting Pot*, to begin climbing like other ethnic groups, no longer provided opportunity for betterment.<sup>65</sup> Instead of production and the creation of more jobs and resources, the focus of new economic thought was on the way that the resources of society would be distributed in a no-growth society. These new ideas contributed to the pattern of development of affirmative action both because it became a useful method of fitting minorities and women into a non-expanding economy and, as they became popularised, because white males felt threatened by any program that might lessen their chances in the job-market. Programs that attempted to regulate existing resources, rather than those aimed at expansion of the total sum of resources, became more relevant. The difference between



early and later affirmative action programs can be seen in this change in the very different assumptions behind them.

Economist Dr. Herman Daly expressed the task for a new government in 1969 as he saw it:

For several reasons the important issue of the stationary state will be distribution, not production. The problem of relative shares can no longer be avoided by appeals to growth. The argument that everyone should be happy as long as his absolute share of wealth increases, regardless of his relative share, will no longer be available... The stationary state would make fewer demands on our environmental resources, but much greater demands on our moral resources.<sup>66</sup>

Daly hit upon a problem that was also highlighted by other economists. The concentration on the realm of distribution rather than production gives a clue as to why affirmative action became an issue in the way that it did.<sup>67</sup> In a no-growth society, affirmative action becomes a zero-sum game. "If there were no growth of income and a constant population [to say nothing of an increasing population], there would be no possibility of someone having less."<sup>68</sup> In such a climate, jobs cease to have the simple function of producing goods and become social goods themselves.<sup>69</sup> If black Americans gain jobs, someone else loses jobs. Here, I will suggest, is the key to understanding why affirmative action became a pervasive political issue despite all the best attempts of Rawls to ensure programs like affirmative action remain administrative imperatives rather than political issues.

### Why affirmative action became an issue

In its conception, there is nothing inherently objectionable about affirmative action. In the context of a constantly expanding job or college places market,

or at least the perception of such, it would be unlikely that affirmative action would provoke any real interest. The idea that someone else is getting preferential treatment can only bother someone when they fail to get a job or college place. At worst, preferential treatment for someone else might be a minor setback. In an expanding job market, most people will be confident that they will get a job. When college places are plentiful and, more importantly, the number of jobs they lead to is expanding, it will matter less if only a second preference of college is given. To use Johnson's metaphor, someone who is confident of winning or at least doing well in a race will not object if others less able are given a head start. He or she can afford magnanimity. The victory will be, if anything, more deserved if all are equal at the starting line. However, those that feel less confident about achieving success in the race will feel the advantages given to some others an onerous burden.

Much as principled objections exist, the real fount of attacks on affirmative action lie in the contention that white males are victimised by the policy. The legalist Edmund Cahn, in his study of the sense of injustice, made the point that people do not become outraged when a decision violates some dialectical pattern or an analytic conception of justice. They become outraged when they feel themselves - or someone they can identify with - being treated unfairly. The sense of injustice, Cahn explains, "...denotes that sympathetic reaction of outrage, horror, shock, resentment, and anger... Nature has thus equipped all men to regard injustice to another as personal aggression." "Justice thus acquires its public meaning, as those in a given ethos perceive the same threat and experience the same organic reactions."<sup>70</sup>

Marco Defunis, whose civil suit against the University of Washington reached the Supreme Court in 1974, launched perhaps the first big battle over affirmative action. DeFunis (and later Alan Bakke, in a suit against the University of California Board of Regents) argued that the affirmative action programs were in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and section 601 of Title VI of the Civil Rights Act of 1964, which provides that no person shall on the ground of race or colour be excluded from participating in any program receiving federal financial assistance. The law school at the University of Washington had set aside 16 percent of the places in its entering classes exclusively for members of racial or ethnic minorities: Philippines-Americans, Chicano-Americans, black Americans, and American Indians. All applicants were screened and categorised by race. Minority applicants were then admitted to the law school using standards much lower than the admission standards applied to whites. While this affirmative action program was in force, Defunis, a white applicant with an adequate record, was rejected by the law school in two successive years. Convinced that he (or some other white applicants in very similar circumstances) would surely have been admitted had his skin been of a different colour, he sued the university for admission, claiming that he had been deprived of his constitutional right to the equal protection of the laws. The university lost the case in the lower court and duly admitted DeFunis. By the time the case reached the Supreme Court DeFunis was nearing the end of his third year and would be allowed to graduate whatever the ruling. The Supreme Court held the case moot.<sup>71</sup>

It is notable that both DeFunis' and Bakke's defences hinged upon the legal objection that affirmative action violated the rights of individual members of groups

not favoured by affirmative action. In other words, they claimed that they were victimised by affirmative action. The response to the Bakke case highlighted the fact that many Americans identified with the plaintiffs.<sup>72</sup> Affirmative action had become to them a new unfair system. Looked at with Habermas's model in mind, the legitimisation crisis incorporated – ironically – a suspicion of institutions, of which affirmative action was now numbered. However, it is unlikely that, in the absence of a sense of insecurity and that affirmative action was a zero-sum game, the amount of outrage at affirmative action programs should become so prevalent.

Historically, also, it may be demonstrated that affirmative action became generalised as an issue only as insecurity about future prospects affected individuals. Reasons for objecting to affirmative action, just like justifications for it, vary throughout the period when the possibility of affirmative action was first raised and today. One source of resentment no longer heard focused upon the abrogation of union rights that affirmative action might entail. George Wallace, as previously noted, raised this objection in 1964. This was also an objection raised by Sam Ervin during the debate in Congress about the Philadelphia plan.<sup>73</sup> Vieira raised another objection that the authority of the government's educative role – its role in educating American citizens away from racism – would be abrogated by its participation in positive discrimination.<sup>74</sup> Another complaint, voiced by Myrdal but still heard today, is that affirmative action undermines the protection of individual rights contained in the Constitution.<sup>75</sup> This is no doubt a salient criticism but it was as true when the Philadelphia plan first emerged as it is today yet, though it is possible to find record of the objection, it was hardly the basis of a mass campaign against affirmative action. Instead, as we have noted in chapter 1, the criticisms

of affirmative action policies then invoked the American Creed and “American principles” in an effort to show that the policy was “undemocratic.”<sup>76</sup> No one now argues that affirmative action is undemocratic without meeting the contention that, had democracy worked for women and minorities in the first place, affirmative action would hardly be needed.

As indicated above, a sense of victimisation first occurred at institutions of higher education. Why? Education became what Lester Thurow called a “defensive necessity” with the changed economic climate.

As the supply of educated labor increases, individuals find that they must improve their educational level simply to defend their current income positions. ...Education becomes a good investment not because it would raise people's incomes above what they would have been if no one had increased his education, but rather because it raises their income above what it will be if others acquire it and they do not. *In effect, education becomes a defensive expenditure necessary to protect one's "market share."* The larger the class of educated labor and the more rapidly it grows, the more such defensive expenditures become imperative.

Thurow felt that the problem emerging from this would be a “demand on the part of disadvantaged groups for ‘open admissions’ to universities.”<sup>77</sup> But the real problem was that *whites* imagined that affirmative action in admission policies might hurt their chances of receiving the new imperative of education. When the conception is of a world in which horizons are not continually expanding, preparation that would enable one to gain initially a high place becomes more important. In other words, the streaming of society appears to happen at the level of education rather than within the organisation joined after graduating. In this limited, defensive market is the origin of the moral indignation at affirmative action, the only real objection to affirmative action that can compete with the moral basis for its existence. As affirmative action programs impacted

in colleges where, as Paul Seabury commented, “the pie is shrinking,” outrage began to build.

Whereas other civil rights policies had threatened whites only when affecting them personally, as in busing and residential desegregation, job quotas became a constant issue with the onset of pervasive economic insecurity in the 1970s, transforming affirmative action from a minor, perhaps-objectionable policy to a threat. However, the perception of a no-growth society and limits to the total number of resources available has long outlasted the recessions of 1974 and 1982. It is this changing *perception* of the economic context that ensured affirmative action would be an issue.

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<sup>1</sup> Cited in Chandran Kukathas and Phillip Pettit, *Rawls: A Theory of Justice and its Critics* (Cambridge: Polity Press, 1990), 1.

<sup>2</sup> Rawls is blunt about his purpose in several later articles where he argues that political philosophy can play an important role in contributing to stable democratic societies. In an article entitled “The Domain of the Political and Overlapping Consensus,” he is forthright in admitting his purpose: “An enduring and secure democratic regime, one not divided into contending doctrinal confessions and hostile social classes, must be willingly and freely supported by at least a substantial majority of its politically active citizens.” Without consensus, a regime “will not be enduring and secure.” See “The Domain of the Political and Overlapping Consensus,” *New York University Law Review*, Vol. 64, No. 2, (May 1989), 233-255, 233. George Klosko also discusses the importance of Rawls’ project of validating liberal systems of government in “Rawls’ ‘Political’ Philosophy and American Democracy,” *American Political Science Review*, Vol. 87, No. 2, (June 1993), 348-359.

<sup>3</sup> Robert Paul Wolff, *Understanding Rawls: A Reconstruction and Critique of A Theory of Justice* (Princeton, NJ, Princeton University Press, 1977), 4.

<sup>4</sup> Of course, this is necessarily a fairly crude summation of entire schools of thought. For a useful and quite lucid introduction into these areas in relation to Rawls, see Wolff, *Understanding Rawls*, 11-15.

<sup>5</sup> Kukathas and Pettit, *A Theory of Justice and its Critics*, 4.

<sup>6</sup> H. Gene Blocker and Elizabeth H. Smith, “Editors’ Introduction,” Blocker and Smith, eds, *John Rawls’ Theory of Social Justice: An Introduction* (Athens, OH: Ohio University Press, 1980), xiii, xvi.

<sup>7</sup> Rawls, though studiously avoiding discussions of the concrete in his book, was committed to the primacy of practical matters. He explained in 1980: “The search for reasonable grounds for reaching agreement rooted in our conception of ourselves and in our relation to society replaces the search for moral truth interpreted as fixed by a prior and independent order of objects and relations... The task is to articulate a public conception of justice that all can live with who regard their person and their relation to society in a certain way. And, although doing this may involve settling theoretical difficulties, the practical social task is primary.” Cited in Thomas W. Pogge, *Realizing Rawls*, (London: Cornell University Press, 1989), 3-4.

<sup>8</sup> Wolff, *Understanding Rawls*, 16.

<sup>9</sup> See Wolff, *Understanding Rawls*, Chapter III, “The Key,” 16-21.

<sup>10</sup> John Rawls, “Justice as Fairness,” *The Philosophical Review*, Vol. 67, No. 2, (April 1958), 164-194.

<sup>11</sup> Rawls, “Justice as Fairness,” 165.

<sup>12</sup> Rawls, “Justice as Fairness,” 167. Here, he uses the baseball analogy.

<sup>13</sup> For a useful discussion of the first form of Rawls’ model, see Wolff, *Understanding Rawls*, 25-34.

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- <sup>14</sup> John Rawls, "Distributive Justice," in Peter Laslett and Walter G. Runciman, ed., *Philosophy, Politics and Society*, 3rd series, (New York: Barnes and Noble, 1967), 58-82.
- <sup>15</sup> Rawls, "Distributive Justice," 66.
- <sup>16</sup> Rawls, "Distributive Justice," 69.
- <sup>17</sup> Ian Shapiro, *The Evolution of Rights in Liberal Theory* (Cambridge: Cambridge University Press, 1986), 225.
- <sup>18</sup> Rawls, "Distributive Justice," 65.
- <sup>19</sup> John H. Schaar, "Equality of Opportunity and the Just Society" in Blocker and Smith, eds., *John Rawls' A Theory of Justice: An Introduction*, 162-184, 166.
- <sup>20</sup> Schaar, "Equality of Opportunity and the Just Society," 167.
- <sup>21</sup> John Rawls, *A Theory of Justice* (London: Oxford University Press, 1973), 75.
- <sup>22</sup> Gunnar Myrdal, *An American Dilemma: the Negro Problem and American Democracy*, (Harper & Brothers Publishers: New York, 1944), 334.
- <sup>23</sup> Rawls, *A Theory of Justice*, 92. Wolff, *Understanding Rawls*, 75.
- <sup>24</sup> Rawls, *A Theory of Justice*, 440, Allen Buchanan, "A Critical Introduction to Rawls," Blocker and Smith, *John Rawls' Theory of Social Justice*, 5-41, 22.
- <sup>25</sup> Rawls, *A Theory of Justice*, 137. Wolff, *Understanding Rawls*, 72.
- <sup>26</sup> Rawls does, however, provide a short analysis of libertarianism elsewhere (*A Theory of Justice*, 65-72).
- <sup>27</sup> Rawls, *A Theory of Justice*, 154. Ian Shapiro, *The Evolution of Rights in Liberal Theory*, (Cambridge: Cambridge University Press, 1986), 210/211, Kukathas and Pettit, *A Theory of Justice and its Critics*, 40.
- <sup>28</sup> See, for instance, John C. Harsanyi, "Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's *A Theory of Justice*," *The American Political Science Review*, Vol. 69, No. 2. (June 1975), 594-606. Harsanyi suggested that it is unreasonable to expect that those in the original position would choose the pessimistic option that Rawls has them choose. Allan Bloom wondered where Rawls had found "cramped little risk-fearing man" in the original position ("Justice: John Rawls Vs. The Tradition of Political Philosophy," review of John Rawls' *A Theory of Justice*, *The American Political Science Review*, Vol. 69, No. 2. (June 1975), 648-662, 659.) Kukathas and Pettit, sympathetic to Rawls' project, make a similar point: "The maximin strategy tells us to rank alternatives by their worst possible outcomes, adopting the alternative whose worst outcome is superior to any other. This is clearly a strategy which would prove attractive to someone with a conservative or pessimistic outlook" (Kukathas and Pettit, *A Theory of Justice and its Critics*, 39).
- <sup>29</sup> Rawls, *A Theory of Justice*, 141. Shapiro, *The Evolution of Rights in Liberal Theory*, 209.
- <sup>30</sup> Rawls, *A Theory of Justice*, 302.
- <sup>31</sup> Shapiro, writing from a left-wing perspective, attacks Rawls on this point: "Rawls... conceives of economic problems as problems of distribution, without giving serious thought to the production of what is to be distributed. Thus in the original position we assume a certain level of development, the availability of certain quantities of primary goods, and the instrumental rationality of the parties; rationally according to the relevant restraints. The question of how these goods are produced in the first place is never considered and presumably held to be irrelevant to the initial decision. Yet the implicit distinction between type and level of development is deeply artificial. One wonders, given the different possible ways of producing wealth to the required level of 'moderate scarcity,' whether our initial contractors might want some assurances about the mode of production to be employed. It is a measure of his lack of attention to questions about production that Rawls can believe once a certain level of economic development has been achieved his principles can be neutral between capitalism and socialism, and equally applicable to both." Shapiro, *The Evolution of Rights in Liberal Theory*, 250. Anarchist critic Wolff agrees: "Inevitably, one finds oneself construing the difference principle as a pure distribution principle. One simply stops asking *how* the goods to be distributed actually come into existence." Wolff, *Understanding Rawls*, 200. Key libertarian critic Robert Nozick makes the same point, saying that "If things fell from heaven like manna, and no one had any special entitlement to any portion of it, and no manna would fall unless all agreed to a particular distribution, and somehow the quantity varied depending on the distribution, then it is plausible to claim that persons placed so that they couldn't make threats, or hold out for specially large shares, would agree to the difference principle of distribution. But is *this* the appropriate model for thinking about how the things people produce should be distributed?" (cited in Wolff, *Understanding Rawls*, 200/201.)

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<sup>32</sup> Wolff, 71-75. Michael Sandel, demonstrating a communitarian critique of Rawls, shows that those in the original position really have no choice and cannot really be construed as individuals at all, given that they know nothing about themselves but think identically. "(T)heir situation is designed in such a way that they are guaranteed to ... 'wish' to choose only certain principles." Michael Sandel, *Liberalism and the Limits to Justice*, (Cambridge: Cambridge University Press, 1982), 127. David L. Norton also voices this point: "Explicitly, the veil of ignorance is intended to nullify the influence upon choice of all 'particulars' on grounds that such influence constitutes 'bias' by 'arbitrary contingencies.' Of course, the ignorance is functional merely, to be attained not by vacuum cleaning the minds in question, but by employing the appropriate constraints on arguments. Nevertheless, it removes from the determination of justice all qualitative distinctions between individuals of the initial situation, who remain numerical (in Rawls' terms, 'theoretically defined') individuals only, differing, as do other identical material bodies, by their occupation of different spaces at a given time. As Rawls is at pains to delineate, these individuals think alike, act alike, feel alike, aspire alike, and – to be sure – choose alike. ... They are replaceable without loss; and while Rawls concedes that all talk of justice would be gratuitous without the existence of conflicts of interests, the only source of conflict that passes the tight mesh of the foregoing stipulations is quantitative." David L. Norton, "Rawls's Theory of Justice: A 'Perfectionist' Rejoinder," *Ethics*, Vol. 85, No. 1, (October 1974), 50-57, 51. See also Kukathas and Pettit, *A Theory of Justice and its Critics*, 96-99.

<sup>33</sup> Alan Bloom comments, "Rawls begins with our moral sense, develops the principles which accord with it, and then sees whether we are satisfied with the results." Bloom, "Justice: John Rawls Vs. The Tradition of Political Philosophy," 650. David Schaefer agreed that "Rawls has been praised for supplying a theoretical, philosophical justification for the political beliefs that many well-intentioned men have held without such support." David Lewis Schaefer, *Justice or Tyranny? A Critique of John Rawls' "A Theory of Justice"* (Port Washington, NY: Kennikat Press, 1979), 4. Wolff writes "Early in the development of philosophy, he hit upon the device of the bargaining game and the two principles as its solution. He clung to it through all the revisions, complications, and adjustments of the theory, and it dominates the exposition of *A Theory of Justice*, notwithstanding the extremely modest and concessive tone of the concluding chapter." Wolff, *Understanding Rawls*, 60.

<sup>34</sup> Wolff and, especially, Shapiro make this point the basis of their criticism of Rawls. Similarly, Hans Oberdiek, reviewing Rawls' book, observed that anyone reading Rawls is left with the "nagging feeling that the original position merely reflects, in an abstract way, contemporary liberal democratic attitudes." "Review: A Theory of Justice," *New York University Law Review*, Vol. 47, No. 5 (November 1972), 1020-1022, 1021.

<sup>35</sup> Daniel Bell makes this point in an interesting article on merit: "But in the larger context, the wholesale adoption of the principle of fairness in all areas of life shifts the entire society from a principle of equal liability and universalism to one of unequal burden and administrative determination." Daniel Bell, "On Meritocracy and Equality," *The Public Interest*, No. 29, (Fall 1972), 29-68, 61. See also Bloom, "Justice: John Rawls Vs. The Tradition of Political Philosophy."

<sup>36</sup> John Schaar provides, in expressive prose, a colourful summation of the problem that face conservatives and others who would defend the existing social systems: "The social welfare, or corporate capitalist and state socialist regimes of our day have exhausted their moral resources. We see all around us persons haunted by intimations of the end of the human experiment, whether in war, or in despoilation of the earth, or in the wasteland of bureaucratic and technological regimentation... We have no widely held conceptions of feasible future alternatives where democracy and human dignity might prevail... On the right, work, thrift, enterprise, and profit are defended as moral values only by a few fanatics. Rather, corporate capitalism is said to be an effective method of raiding the GNP and assuring a high level of consumption... We hardly pretend any more that the whole system is admirable, worthy in its own right of loyalty and devotion. Probably the only real focal value offered us by our societies today is the satisfaction of private desires, largely through consumption. Beyond that, the system is pointless, unable to make a defense for itself, not admired even by those with rooms at the top." Schaar, "Equality of Opportunity and the Just Society," 163.

<sup>37</sup> Richard King criticises "recent academic thought, particularly the influential and rich liberal political theory, as exemplified in the work of John Rawls" as "unconcerned with historical context or concrete historical specification." See *Civil Rights and the Idea of Freedom* (Oxford: Oxford University Press,



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1992), 8. Hans Oberdiek also makes this criticism. See his review of *A Theory of Justice*, *New York University Law Review*, Vol. 47, No. 5 (November 1972), 1021.

<sup>38</sup> Rawls, *A Theory of Justice*, 101, cited in Bell, "On Meritocracy and Equality," 57.

<sup>39</sup> Schaefer, *Justice or Tyranny*, 106.

<sup>40</sup> For instance, Shapiro wrote: "No affirmative action could be justified, for Rawls, if it involved the mildest infraction of the equal liberty of the most advantaged." Shapiro, *The Evolution of Rights in Liberal Theory*, 221.

<sup>41</sup> "Any inequality must work to the benefit of everyone, in particular, the least advantaged. If the latter are better off with the unequal situation than they would be with equality, there is no injustice... Movements toward equality are justified as long as they do not worsen the situation of the least advantaged; movements away from equality are justified if they benefit the least advantaged." "In view of this, preferential treatment in employment and school admissions would seem to be as acceptable instrument for realizing incremental advance in the direction of equality... The theory of justice would seem to require reverse discrimination to correct the imbalance flowing from the differences in wealth and power condemned by the difference principle. Indeed, hiring even the incompetent might be justified by this principle. If doing so would contribute to a shift toward equality without worsening the situation of the disadvantaged, this would be justified. In many professions such as law and medicine, though, hiring the incompetent would presumably benefit (if at all) only some of the disadvantaged to the detriment of others also disadvantaged." Hardy Jones, "A Rawlsian Discussion of Discrimination" Blocker and Smith, *John Rawls' Theory of Social Justice*, 270-288, 284-285.

<sup>42</sup> Alan H. Goldman, *Justice and Reverse Discrimination* (Princeton, NJ: Princeton University Press, 1979), Robert K. Fullinwider, *The Reverse Discrimination Controversy: A Moral and Legal Analysis* (Totowa, NJ: Rowman and Littlefield, 1980).

<sup>43</sup> Rawls' theory was important in answering many points about affirmative action that emerged around this time. A particular question emerged over whether affirmative action could be justified solely in terms of past discrimination. Rawls provided the answer in that policies must always, to be just, be orientated towards the least well-off, who might be defined as a group or as individuals. That individuals personally suffered discrimination is, then, besides the point. Thus, affirmative action policies need not simply be orientated towards blacks. For an interesting article dealing with these difficulties, see George Sher, "Justifying Reverse Discrimination in Employment," *Philosophy and Public Affairs*, Vol. 4, No. 2. (Winter, 1975), 159-170.

<sup>44</sup> Rawls, *A Theory of Justice*, 450.

<sup>45</sup> H. George Fredrickson, "Toward a New Public Administration," in Frank Marini, ed., *Toward a New Public Administration* (Scranton, PA: Chandler, 1971), 71.

<sup>46</sup> Karl Marx makes the point that Jeremy Bentham's philosophy was the perspective of the English shopkeeper writ large. Marx was particularly scathing about Bentham, whom he called a "genius in the way of bourgeois stupidity," "that insipid, leather-tongued oracle of the ordinary bourgeois intelligence of the 19<sup>th</sup> century." Karl Marx, *Capital: A Critique of Political Economy*, Volume 1 (London: Lawrence and Wishart, 1993), 571n, 570-71. A case might be made that, if the dominant perspective of the 19<sup>th</sup> century United States was that of the self-made Horatio Alger, the late twentieth century – with Rawls as its representative philosopher – belongs to the lawyer and public administrator.

<sup>47</sup> David K. Hart, "Social Equity, Justice, and the Equitable Administrator," A Symposium: Social Equity and Administration, *Public Administration Review*, Vol. 34, No. 1, (January/February, 1974), 3-11, 3.

<sup>48</sup> Hart, Social Equity, Justice, and the Equitable Administrator," 4.

<sup>49</sup> Michael Harmon cites the existing authority on the subject as Herman Finer, who wrote a "landmark essay on the subject" in 1940. Finer insisted that administrators should retain strict neutrality and were to be watched closely by an elected Congress. Harmon contrasts the new framework for public administration suggested by Rawls' with Finer's approach. See Michael M. Harmon, "Social Equity and Organizational Man: Motivation and Organizational Democracy," *Public Administration Review*, Vol 34, No. 1, (January/February, 1974), A Symposium: Social Equity and Administration, 11-18.

<sup>50</sup> Eugene B. McGregor, Jr., "Social Equity and the Public Service," Vol. 34, No. 1, (January/February, 1974), A Symposium: Social Equity and Administration, 18-28.

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- <sup>51</sup> David T. Stanley, "Whose Merit? How Much?" in "A Symposium: The Merit Principle Today," *Public Administration Review*, Vol. 34, No. 5 (September/October 1974), 2-3, 2.
- <sup>52</sup> Catherine Lovell, "Three Key Issues in Affirmative Action" in "A Mini-Symposium: Affirmative Action in Public Employment," *Public Administration Review* No. 3 (May/June 1974), 235-236, 235. It is instructive that, throughout the symposium, contributors used the term "quotas" to denote affirmative action with no hint that the term might be problematic.
- <sup>53</sup> See Frederick Winslow Taylor, *The Principles Of Scientific Management* (New York: Norton, 1967).
- <sup>54</sup> cited in Christopher Lasch, *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* (London: Abacus, 1980), 19.
- <sup>55</sup> Dennis L. Meadows, Donella H. Meadows, Jorgen Randers, William W. Behrens III, *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (Potomac Associates: London, 1972). This work is perhaps the most ambitious of several appearing around the same time. Paul R. Ehrlich published the widely-read *The Population Bomb* in 1968, predicting disaster if steps were not taken to curb the growth of the world's population. While the study of the growth of the world population is distinct in many ways from economic theories, it became an important element in arguments against further growth. (London: Pan Books, 1971, originally published in New York by Ballantine, 1968). Many other works appeared that, while differing in subject matter from the Club of Rome's analysis, served to strengthen its central theme that growth trends of the past can no longer be sustained. Rufus E. Miles stressed that the most important limits to growth would be political, "set by the already overstrained capacity of human beings to conceive, design, manage, support, and adapt to extremely complex systems of human interdependence." (Rufus E. Miles, Jr., *Awakening from the American Dream: The Social and Political Limits to Growth* [New York: Universe Books, 1976], 2). Fred Hirsch, critical of *The Limits to Growth*, insisted that the limits to growth social; as society becomes wealthier, the relative position of citizens within it become more important, rendering strict material progress more and more irrelevant. See Hirsch, *The Social Limits to Growth* (London: Routledge and Kegan Paul, 1977).
- <sup>56</sup> Meadows et al, *The Limits to Growth*. 23-24.
- <sup>57</sup> Cited in S. Fred Singer, "Do We Dare to Grow?," *Nation*, (November 27 1972), 527-531, 530.
- <sup>58</sup> Miles, *Awakening from the American Dream*, 2.
- <sup>59</sup> Singer, "Do We Dare to Grow?," 530.
- <sup>60</sup> H. S. D. Cole et al, *Thinking About the Future: A Critique of the Limits to Growth* (London: Chatto and Windus, 1973), 6.
- <sup>61</sup> Many have noted the failure of many if not most of the gloomiest of the Club of Rome's predictions to come true. Yet this trend in thinking has become, if anything, more pervasive. Unfortunately (or, perhaps, very fortunately!), it is beyond the scope of this dissertation to discuss these ideas in a more in-depth fashion. For a useful look at the way environmental risks are computed, arguing that the way we see risk is conditioned, see Mary Douglas and Aaron Wildavsky, *Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers* (Berkeley, CA: University of California Press, 1982). Wildavsky's last work, *But is it True?: A Citizen's Guide to Environmental Health and Safety Issues* (Cambridge, MA: Harvard University Press, 1995) questions whether many of the dire predictions about the environmental impact of what are known as "health hazards" have any basis.
- <sup>62</sup> Mancur Olson, "Introduction," in Mancur Olson and Hans H. Landsberg, *The No-Growth Society* (London: The Woburn Press, 1975, originally published by the American Academy of Arts and Sciences, 1973), 1-9, 1.
- <sup>63</sup> See Kukathas and Pettit, *Rawls: A Theory of Justice*, 41-42.
- <sup>64</sup> Shapiro, *The Evolution of Rights in Liberal Theory*, 250.
- <sup>65</sup> Nathan Glazer and Daniel Patrick Moynihan, *Beyond the Melting Pot: the Negroes, Puerto Ricans, Jews, Italians and Irish of New York City* (London: The M.I.T. Press, 1970). It is worth contrasting the less optimistic predictions about the ability of blacks to integrate into the rest of society in the introduction to the 1970 edition with the rosy scenario Glazer and Moynihan had sketched in 1963.
- <sup>66</sup> Cited in Dennis L. Meadows et al, *The Limits to Growth*, 179.
- <sup>67</sup> Many erstwhile opponents of affirmative action propose that poverty, rather than race, becomes the mechanism of distribution. See, for instance, Richard D. Kahlenberg, *The Remedy: Class, Race, and Affirmative Action* (New York: Basic Books: 1996). As long as the analysis of the problems is focused on

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unequal *distribution*, rather than within the realm of *production*, some form of affirmative action can hardly be avoided.

<sup>68</sup> Mancur Olson, "Introduction," *The No-Growth Society*, 7. On the following page, Olson also notes that: "Another characteristic that no-growth societies have is an extraordinary degree of governmental or other collective action."

<sup>69</sup> This change in conception – connected to a concentration on the sphere of distribution rather than production – had been recognised before but was not generalised when it was first recognised. In response to the threat of automation in 1960, the West Coast Longshoreman made an agreement with the Pacific Maritime Association. "the significance," observed William Gomberg in *The Nation*, "of this agreement is the rational way it treats the problem of worker displacement by the frank recognition of the worker's property right in his job." (Gomberg, "The Job as Property," *The Nation*, Nov. 26 1960, 410-412, 411.) Some useful research could be done tracing the precedents for many aspects of affirmative action in labor agreements.

<sup>70</sup> Edmund Cahn, *The Sense of Injustice: An Anthropocentric View of Law* (London: Oxford University Press, 1949) 24, 25.

<sup>71</sup> See Chapter 9 "Reverse Discrimination" (223-239) of Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978).

<sup>72</sup> Some of the books published about the decision include Alexander W., Astin, Bruce Fuller, & Kenneth Green, *Admitting and Assisting Students After Bakke* (San Francisco, CA: Jossey-Bass, 1978), Joel Dreyfuss, & Charles Lawrence, *The Bakke Case: The Politics of Inequality*. (New York: Harcourt Brace Jovanovich, 1979), Terry Eastland and William J. Bennett, *Counting by Race: Equality from the Founding Fathers to Bakke and Weber* (New York: Basic Books, 1979), Allan P. Sindler, *Bakke, DeFunis, and Minority Admissions: The Quest for Equal Opportunity* (New York: Longman, 1978). United States Commission on Civil Rights. *Toward an Understanding of Bakke* (Washington, D.C.: United States Commission on Civil Rights, 1979).

<sup>73</sup> Ervin stated that the plan effectively nullified the Taft-Hartley Act and the section of Title VII of the 1964 Civil Rights Act that protected unions' seniority systems. *CR*, 91<sup>st</sup> Congress, December 15 1969, 39122.

<sup>74</sup> Norman Vieira, "Racial Imbalance, Black Separatism and Permissible Classification by Race," *Michigan Law Review*, Vol. 67 (June 1969), 1603-1618, 1613.

<sup>75</sup> "This norm (whereby blacks and whites share resources according to their proportions in the population) is in conflict with the Constitution, since it refers to the Negro *group* and does not guarantee *individuals* their right." Myrdal, *An American Dilemma*, 336.

<sup>76</sup> The best example of this perception is probably David Danzig, "The Meaning of Negro Strategy," *Commentary*, Vol. 37, No. 2, (February 1964), 41-46.

<sup>77</sup> Cited in Daniel Bell, "On Meritocracy and Equality," *The Public Interest*, No. 29, (Fall 1972), 29-68, 34.

## CONCLUSION

The aim of this study has been to explore the origins of affirmative action in order to shed new light on it, the Nixon presidency and recent intellectual history. In resolving the specific historical mystery set at the beginning – why did a conservative president first implement affirmative action and oversee a huge expansion of affirmative action programs? – this dissertation has re-examined the nature of the Nixon presidency and suggested that affirmative action was less the progenitor of policy changes than the result of a change in liberalism itself. It has been demonstrated on the preceding pages that the ideological differences between friends and foes of affirmative action are less significant than the acceptance by both sides of what is termed here a culture of limits. Finally, the research indicates that the nature of affirmative action has less to do with racial or ethnic divisions and more to do with a pervasive critique of the equity and justice of concepts such as “merit” and “efficiency.”

The dissertation builds upon but also argues against much of the existing scholarship. Hugh Davis Graham, who has written the seminal text on the history of affirmative action policy, maintains that the logic of the policy itself – the fact that affirmative action included enforceable targets and goals – encouraged civil rights activists to push for it in the mid 1960s.<sup>1</sup> That the exhaustion of enforcement mechanisms of policies put in place in the early 1960s logically led to affirmative action has not been disputed here. A parallel process occurred in school desegregation efforts. Instead, I maintain that affirmative action policies would have been insignificant without a fundamental shift in liberal values that brought them to prominence.

The importance of understanding the role of the previous policy paradigm in preventing affirmative action policies is emphasised in Part I, building upon the work of John Skrentny.<sup>2</sup> What was it that prevented what seems to be an obvious idea from being implemented?<sup>3</sup> This dissertation has emphasised the importance of Gunnar Myrdal's *An American Dilemma*, both in its expression of a deep-seated belief in the "American Creed" and its influence in shaping attitudes towards issues of race. Within the Myrdalian paradigm, justification for or arguments against any affirmative action programs related primarily to the goal of reforming white America away from racial divisions. The barriers to full integration of African-Americans into the mainstream of American society were perceived to be a (white) "hearts and minds" problem. This approach to race relations meant that affirmative action was perceived as useful only in its ability to kick-start a process that would take place organically within white America, destroying the basis of the racial divide. An employment quota might alienate white labor – one of Myrdal's favoured institutions for extirpating racism – from civil rights efforts. Enforced quotas on any large scale, moreover, denied that the process would take place organically. Not surprisingly, given the "contact theory" made popular by Gordon Allport and the sanguine contemporary view of the possibilities of racial reform, race relations efforts of the 1950s and 1960s focused upon education rather than employment. That this concentration on education continued throughout Nixon's first term indicates the powerful legacy of the Myrdalian paradigm.

Again building on Skrentny, this dissertation discusses the nature of the crisis that destroyed the liberal consensus, clearing the way for affirmative action.<sup>4</sup> Skrentny mainly focuses on the riots occurring in the late 1960s. This thesis proposes a broader conception of the crisis and the implications for the elite of the destruction

of the Myrdalian paradigm. The shift that took place beginning in the 1960s (perhaps even continuing today) was the movement away from the belief that the capitalist market is the basis of an equitable, just, and rational society. Milton Friedman's assertion that racial divisions were irrational and thus antipathetic to the capitalist market appeared naïve even at the time of its publication.<sup>5</sup> By the end of the 1960s it appeared ridiculous. The basic institutions and precepts of post-war American society, from the trade union movement to political parties to the concept of merit, came under serious question. Even the neo-conservative revival of free market policies and the triumph of capitalism over communism after the fall of the Berlin Wall have not managed to stem this critique of the fairness of capitalism.

The implementation of affirmative action policies in the late 1960s and 1970s is best explained in terms of Jürgen Habermas's *Legitimation Crisis*.<sup>6</sup> Here it is possible to see that, whatever the ideological colour of an administration, policymakers felt they had to replace these previously informally administered institutions with direct government control. Thus, the informal system whereby management and trade unions worked out at a local level who would be hired/fired/promoted was, in some ways, supplanted by direct government involvement in these decisions. As Habermas observed, this process led to more government (and quasi-government) intervention as the first round of intervention tended to undermine yet more institutions, necessitating further intervention. The first affirmative action policies undermined traditional criteria for awarding government contracts. However, they soon impinged upon decisions made at local levels. An example of the end product of this process, where Jersey Central Power and Light asked the court to review the list of personnel it intended to lay off in order to ensure it complied with affirmative action and union contracts, is given above. A decision

that in the past would have been made by local management and perhaps contested by a union was now subject to court intervention.

Nixon played a crucial but misunderstood role in the genesis of affirmative action. Existing scholarship has overestimated the contribution of the Philadelphia Plan – the first enforced affirmative action program – to the creation of modern affirmative action programs.<sup>7</sup> It neither “worked” in the sense that it fulfilled its goals nor provided a blueprint for later affirmative action. Its importance lies in the congressional battle over its continued existence in December 1969. Besides a rump of Southern resistance that saw all civil rights measures as parts of a plot against the South, those resisting the Philadelphia Plan were generally connected with organised labor. The debate over the Philadelphia Plan’s future in Congress reflected the destruction of labor as a force for progress in American society; very few complaints against affirmative action on the basis that it curbs union rights can be heard today. Both in its operation and in the arguments against it, the Philadelphia Plan, and its close relatives, the hometown plans and Order No. 4, belong more to Johnson’s Great Society than a later affirmative action paradigm. The focus of all three, at that stage, was on reforming urban ghettos. The Philadelphia Plan was part of Nixon’s “holding pattern” in 1969, when he simply continued with many of the Johnson priorities. Shortly after defending it in congress, Nixon dropped it and barely mentioned it again.

If the Philadelphia Plan was a dead end in the evolutionary process of affirmative action, other initiatives in Nixon’s first term were not. These were designed to use the Federal Government’s financial muscle to insist on black representation (and, perhaps less consciously, to use the moral imperative of black representation to justify the Federal government’s increased intervention into hitherto privately negotiated spheres). Instead of being policed inadequately by Federal

authorities, like the Philadelphia Plan, these programs succeeded largely by self-policing. A reinterpretation of Johnson's Executive Order 11246 taking place in 1969 included universities and colleges as well as state and local government within its remit. The "set aside" strategy of the OMBE, though it initially foundered when centred on ghetto industries, has become one of the most important affirmative action programs in existence. EO11478 ensured that affirmative action took place in Federal government employment. Revenue sharing reorganised the complex system of Federal grants. When the Revenue Sharing Act of 1972 passed, it added another string to be attached to Federal loans and grants, vastly extending federal control over the minutiae of local administration. Surely these programs were more effective in "rulemaking to bind recipients to federal dollars," as Graham put it.

Whereas much of the existing scholarship sees the Philadelphia Plan as the culmination of the development of affirmative action, this study emphasises the rapid growth of affirmative action after 1970. On this level, Nixon's input was crucial. In 1970 he made a conscious decision to give up attempts to reform the ghettos and instead to concentrate civil rights efforts on creating a stable black middle-class. Though some of the scholarship recognises that some sort of shift took place at this time, it sees the shift in purely negative terms (see Chapter 8). No one has yet pointed out the fact that Nixon simply rationalised civil rights policy at this stage. Besides calling for increased "cultural legitimacy" for black Americans and \$100m to fund black colleges, Nixon instructed staff not to aim efforts at "street-corner society." While the Philadelphia Plan and hometown plans languished, the OMBE broadened its efforts, moving away from failing ghetto industries and attempts at building public/private "partnerships" and towards contracting to black or minority-owned firm. Nixon also broadened the intended beneficiaries of affirmative action by



concentrating the administration's attention on Native Americans and Hispanics, as well.

Nixon's curious espousal of early affirmative action is not necessarily so curious if we view affirmative action within the very different context of the times. Existing scholarship tends to emphasise his "apprincipled" (or "unprincipled," depending on the degree of sympathy for Nixon held by the author) character in order to explain his combination of liberal and right-wing policy decisions (see Chapter 9). However, one principle that Nixon could claim as his explains both his stout defence of the Philadelphia Plan and his condemnation of quotas in the run-up to the 1972 election. As Gary Wills observed, Nixon truly believed in the "right to earn," a version of the Protestant work ethic identified by Weber. At that time almost self-evident, this right to earn is today difficult to understand now that work is seen by many as a limitation of the development of the self rather than its realisation.<sup>8</sup> Nixon's generation, however, believed that work was a moral duty, a social obligation and the route to personal success. Nixon wished to include blacks within this work-based society; he wished to extend to them the right to earn. Thus, he supported affirmative action efforts; yet, he could simultaneously attack quotas as they might limit the right to earn for whites.

The question of whether or not Nixon was an unlikely hero depends upon one's perspective. Despite his hatred for the elite (which was certainly reciprocated), he helped to transform the difficult question of civil rights, which had provoked widespread questioning of the legitimacy of the entire "system," into a question of allocation of resources. In some ways, by rationalising government, he created a temporary resolution to the legitimation deficit. Blacks and whites critical of the system and liable to reject the authority of the elite now appealed to it to reallocate

resources more equitably. The State, once regarded as an armed body prepared to defend capitalism, was now regarded as a referee or appeals board. Voices were lowered, peace restored, and restless citizens became passive consumers. The services Richard Nixon performed to the status quo may have to be reviewed anew by future historians. To those who object to the increasing intervention of the American State into the lives of its citizens, Nixon is anything but a hero. He may well be vilified, ironically, as the facilitator of a vast increase in the growth of the US State as well as because of Watergate. It is worth recalling Graham's observation that the *Federal Register* quintupled during Nixon's first term.

Other important developments, beyond the scope of presidential involvement aligned with both the legitimation crisis and Nixon's rationalisation attempts, prepared the ground for affirmative action. Changes in the economy that progressively tied private enterprise to government made enforcement of affirmative action possible. In the 1950s, in a period of rapid military expansion, contractors could negotiate from a position of strength. In the 1970s, a cut-back in defense and other expenditures created competition for contracts. In this climate, a progressive affirmative action policy might tip the balance for a contractor.

This thesis puts new emphasis on the distinction between affirmative action's growth as evolving *set of policies* and affirmative action as an *issue*. As pointed out in Section III, the *issue* of affirmative action – the widespread public argument about whether affirmative action creates useful and just policies – had yet to develop during Nixon's first term. Here is another reason why Nixon saw no contradiction in his support of affirmative action and his dislike of quotas that limited opportunities – he referred to the operation of certain policies rather than relating to a pervasive public debate. There was little continuum between the objections to quotas

heard in 1964 and those heard in the mid-1970s. In particular, the most important objection to affirmative action heard today – that it is inherently unfair to those excluded from its categories – did not really arise until the *DeFunis* and *Bakke* Supreme Court cases. Thus the emphasis of this thesis has been on determining what has changed in the intellectual climate that both lent itself to the proliferation of affirmative action policies and ensured that they would become a near-permanent issue in the American polity.

Hugh Graham has mentioned John Rawls as a “theoretician” of affirmative action, amongst others. Yet the process of the development of affirmative action is better explained by William Safire’s observation that sometimes fitting a philosophy to the set of deeds is what must be done.<sup>9</sup> This thesis examines Rawls’ *A Theory of Justice* not as the theoretical basis of affirmative action but as an explication of the need, in the light of the legitimation crisis, for a new ethical framework for liberalism. Thus, it places Rawls’ strangely ahistorical tract within its historical context. *A Theory of Justice* does not deal directly with affirmative action but his “difference principle,” whereby any decision must benefit the least well-off, at least points in the direction of a new way to allocate resources. Affirmative action policies fit the bill.

This dissertation places new emphasis on the implications of what is termed the “culture of limits” emerging in the early 1970s for affirmative action. Perhaps most famously rehearsed in the Club of Rome’s 1973 publication, *The Limits to Growth*, the perspective that resources are finite, that constantly increasing production is both unrealistic and undesirable, changed the political and cultural landscape in the 1970s and 1980s dramatically. In relation to affirmative action, the culture of limits both creates the need for affirmative action policies and makes

affirmative action a continuous focus of resentment. When focus is no longer placed on increased production, attention to how resources are divided becomes paramount. In a stationary state, the problem of relative shares can no longer be overcome by appeals to growth. Kennedy's dictum, "a rising tide lifts all boats," was no longer deemed valid. Instead, as with Rawls, focus increasingly turned to the search for an equitable method of dividing resources. Affirmative action becomes a key replacement for the relatively automatic distribution of resources within the continuously expanding capitalist market.

## Reflections on the Current Debate

Affirmative action is perhaps best understood as the relatively constant *form* in which a set of complex, evolving, and often-contradictory tendencies have found expression. Nearly every aspect of the term – save the name – has changed profoundly in the past thirty years. Thus the story of how American politics and culture have changed a set of deeds into a philosophy has been the remit of this thesis. The argument put forward on the preceding pages is that the most important developments in the genesis of affirmative action occurred *after* the implementation of the Philadelphia Plan and Order No. 4; some occurred very recently – such as the heightening of the importance of diversity as a justification. Moreover, they occurred *outside* of the development of the policies. The suggestion here is that the tendencies underneath this form hold the key to a real understanding of the phenomenon.

A number of fairly large implications emerge from this study. The most important is that the affirmative action problematic exists relatively independently of the issues of race and gender. Affirmative action is less the heir of the 1960s civil rights struggles than it appears to be. The essential condition for what Nathan Glazer termed the “institutionalisation” of affirmative action – and, we might add, the institutionalisation of arguments surrounding it – is suspicion of the category of efficiency and, thus, merit. Underlying is a *tension between the cultural and economic spheres of American life*. This is not to question the motives of those who put affirmative action policies in place or even to comment on whether the policies are effective or not. Instead, I am saying first that even if the need to include blacks within American society did not exist, some sort of system that justified personnel,

management and selection procedures in both private companies and government would have to be invented. Second, whatever method this system employed to distribute jobs, college places, contracts, whatever categories of “affected classes” existed, controversy would ensue.

In the past, as the passage by Friedman implies, people were hired on merit in relation to their role in production. In a climate with no culture of limits, where more was considered better, the need for constant increases in productivity overrode all other considerations. The most efficient worker or contractor was hired for the job, the highest scoring student accepted. But if the goal of maximising production is downgraded, so is the importance of hiring the most efficient worker for the job. Of course, capitalist production continues and the relation of categories of efficiency, performance and, thus, merit can not be entirely jettisoned. Yet there appears to be a permanent questioning of the relevance of these categories. The testing of prospective college students is under constant discussion. Are School Admissions Tests useful? Is the testing procedure itself a reliable predictor of success both during and after college? Goals other than efficiency – such as the efforts by contractors to hire and promote minorities and women – become equal in importance to efficiency. Some system employing factors different to maximising production *must* be found. Hence the widespread adoption of affirmative action policies.

Yet affirmative action criteria remain extraneous to the production process and in their often-random categories (the distinction in the 8a program between those of Nepalese extraction, who are included as affected classes, and those of Afghan extraction, who are not, springs to mind<sup>10</sup>) are themselves subject to constant questioning. Some opponents of affirmative action accept that merit can not be the sole reason for accepting college students, awarding contracts or hiring and

promoting. William Julius Wilson, followed by Dinesh D'Souza and others, argue not against preferences in principle but against the present racial definitions of the beneficiaries of affirmative action.<sup>11</sup> But it has been suggested by the analysis on the preceding pages that *whatever* criteria are used to decide how the resources of society are divided will lack the organic and automatic system of allocation of the market economy. Not only will they seem random and face contestation by those outside their boundaries (necessitating further government intervention), they will constantly bump up against the economic need for efficiency.

The suggestion of this research is that the right/left discussion surrounding affirmative action can not be resolved, as it expresses a tension between the need for efficiency and maximum productivity of the economy on the one hand and the pervasive cultural critique of the justice and equity of the market on the other. In sum, There was no “wrong turn” away from the colorblind civil rights perspectives in the 1960s made by liberalism, nor is affirmative action simply the culmination of the civil rights efforts of the post-war period.

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<sup>1</sup> Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960-1972* (Oxford University Press: New York, 1990).

<sup>2</sup> John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (London: University of Chicago Press, 1996). Part One of Skrentny's book is entitled “Understanding Resistance to Affirmative Action.”

<sup>3</sup> The concept of quotas for addressing black inequality was first voiced in 1871 by Major Martin Delany, a black unionist soldier who later joined the Democrats. Cited in Seymour Martin Lipset, *American Exceptionalism: A Double Edged Sword* (London: W. W. Norton and Co., 1996), 312n.

<sup>4</sup> See “Crisis Management through Affirmative Action” in Skrentny, *The Ironies of Affirmative Action*, 67-110 (Chapter 4).

<sup>5</sup> See Chapter 2, 65-66.

<sup>6</sup> Jürgen Habermas, translated by Thomas McCarthy, *Legitimation Crisis* (London: Heinemann Educational, 1976). Skrentny uses this book to define what a crisis is but explores it no further. See *The Ironies of Affirmative Action*, 257n.

<sup>7</sup> The most influential book to emphasise the importance of the Philadelphia Plan is Hugh Davis Graham, *The Civil Rights Era*. See also J. Larry Hood, “The Nixon Administration and the Revised Philadelphia Plan for Affirmative Action: A Study in Expanding Presidential Power and Divided Government” *Presidential Studies Quarterly* 23 (1993): 145-67, Jill Quadagno, *The Color of Welfare*

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(New York: Oxford University Press, 1994), Stephen Steinberg, *Turning Back: The Retreat from Racial Justice in American Thought and Social Policy* (Boston, MA: Beacon Press, 1995).

<sup>8</sup> For an interesting discussion of new ways in which work is understood, see Andre Gorz, *Reclaiming Work: Beyond the Wage-Based Society* (translated by Chris Turner. Cambridge, UK: Polity Press, 1999).

<sup>9</sup> See Chapter 1, 27.

<sup>10</sup> See Introduction, 7.

<sup>11</sup> Though first suggested in William Julius Wilson, *The Declining Significance of Race: Blacks and Changing American Institutions* (London: University of Chicago Press, 1978), this perspective is more fully explicated in *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (Chicago: University of Chicago Press, 1987) and *When Work Disappears: New Implications for Race and Urban Poverty in the Global Economy* (London: Centre for Analysis of Social Exclusion, 1998). Dinesh D'Souza, who opposes affirmative action, stated that Universities should "retain their policies of preferential treatment, but alter their criteria of application from race to socioeconomic disadvantage." (cited in Francis J. Beckwith and Todd E. Jones, "Introduction to Part 1" (21-33) of *Affirmative Action: Social Justice or Reverse Discrimination?* (Amherst, NY: Prometheus Books, 1997), 29. Like Bill Clinton, who said "mend it – don't end it," Seymour Martin Lipset warns that "affirmative action should be refocused, not discarded." (*American Exceptionalism*, 149.) Perhaps the best explication of this view is in Richard D. Kahlenberg, *The Remedy: Class, Race, and Affirmative Action* (New York: Basic Books: 1996). He declares that "the thesis of this book is that affirmative action, a well-intentioned but flawed instrument of public policy, should not be discarded but should be revamped so that preferences in education, in employment, and in government contracting are provided on the basis of class, not race or gender." (ix). Other opponents of affirmative action argue, often crudely, that those excluded from the affected classes (white males) are themselves victims of affirmative action. See, for instance, Fred Lynch, *Invisible Victims: White Males and the Crisis of Affirmative Action* (London: Greenwood, 1989). This is also not an argument against preferential treatment but a plea that white males be included.



## *Appendix I*

### **Titles VI and VII of the 1964 Civil Rights Act**

#### **Title VI NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS**

SEC. 604. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

#### **Title VII EQUAL EMPLOYMENT OPPORTUNITY**

Section 703(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

Section 703(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Section 706 (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

Source: <http://www.dot.gov/ost/docr/CIVILR64.HTM#7>

## *Appendix II*

### **Executive Order 11246**

#### **Subpart B – Contractors' Agreements**

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

See for Section 8(a) of the  
Small Business Act of 1953

## *Appendix III*

### **Section 8(a) of the Small Business Act**

Sec. 8. (a) It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary –

“(1) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies or material to the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer; and

“(2) to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small-business concerns or others for the manufacture, supply, or assembly of such articles, equipment, supplies, or materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts.

“(b) It shall also be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary-

“(1) to provide technical and managerial aids to small-business concerns, by advising and counseling on matters in connection with Government procurement and property disposal and on policies, principles, and practices of good management, including but not limited to cost accounting, methods of financing, business insurance, accident control, wage incentives, and methods engineering, by cooperating and advising with voluntary business, professional, educational, and other nonprofit organizations, associations, and institutions and with other Federal and State agencies by maintaining a clearinghouse for information concerning the managing, financing, and operation of

small-business enterprises, by disseminating such information, and by such other activities as are deemed appropriate by the Administration;

"(2) to make a complete inventory of all productive facilities of small-business concerns or to arrange for such inventory to be made by any other governmental agency which has the facilities. In making any such inventory, the appropriate agencies in the several States may be requested to furnish an inventory of the productive facilities of small-business concerns in each respective State if such an inventory is available or in prospect;

"(3) to coordinate and to ascertain the means by which the productive capacity of small-business concerns can be most effectively utilized;

"(4) to consult and cooperate with officers of the Government having procurement or property disposal powers, in order to utilize the potential productive capacity of plants operated by small-business concerns;

"(5) to obtain information as to methods and practices which Government prime contractors utilize in letting subcontracts and to take action to encourage the letting of subcontracts by prime contractors to small-business concerns at prices and on conditions and terms which are fair and equitable;

"(6) to determine within any industry the concerns, firms, persons, corporations, partnerships, cooperatives, or other business enterprises which are to be designated 'small-business concerns' for the purpose of effectuating the provisions of this Act. To carry out this purpose the Administrator, when requested to do so, shall issue in response to each such request an appropriate certificate certifying an individual concern as a 'small-business concern' in accordance with the criteria expressed in this Act. Any such certificate shall be subject to revocation when the concern covered thereby ceases to be a 'small-business concern'. Offices of the Government having procurement or lending powers, or engaging in the disposal of Federal property or allocating materials or supplies, or promulgating regulations affecting the distribution of materials or supplies, shall accept as conclusive the Administration's determination as to which enterprises are to be designated 'small-business concerns', as authorized and directed under this paragraph;

"(7) to certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to the competency, as to capacity and credit, of any small-business concern or group of such concerns to perform a specific Government contract. In any case in which a small business concern or group of such concerns has been certified by or under the authority of the Administration to be a competent Government contractor with respect to capacity and credit in connection with a specific Government contract, the officers of the Government having procurement or property disposal powers are directed to accept such certification as conclusive, and are authorized to let such Government contract to such concern or group of concerns without requiring it to meet any other requirement with respect to capacity and credit;

"(8) to obtain from any Federal department, establishment, or agency engaged in procurement or in the financing of procurement or production such reports concerning the letting of contracts and subcontracts and the making of loans to business concerns as it may deem pertinent in carrying out its functions under this Act;

"(9) to obtain from any Federal department, establishment, or agency engaged in the disposal of Federal property such reports concerning the solicitation of bids, time of sale, or otherwise as it may deem pertinent in carrying out its functions under this Act;

"(10) to obtain from suppliers of materials information pertaining to the method of filling orders and the bases for allocating their supply, whenever it appears that any small business is unable to obtain materials from its normal sources:

"(11) to make studies and recommendations to the appropriate Federal agencies to insure that a fair proportion of the total purchases and contracts for property and services for the Government be placed with small-business enterprises, to insure that a fair proportion of Government contracts for research and development be placed with small-business concerns, to insure that a fair proportion of the total sales of Government property be made to small-business concerns, and to insure a fair and equitable share of materials, supplies, and equipment to small-business concerns;

"(12) to consult and cooperate with all Government agencies for the purpose of insuring that small-business concerns shall receive fair and reasonable treatment from such agencies; and

"(13) to establish such small business advisory boards and committees truly representative of small business as may be necessary to achieve the purposes of this Act.

"(c) The Administration shall from time to time make studies of matters materially affecting the competitive strength of small business, and of the effect on small business of Federal laws, programs, and regulations, and shall make recommendations to the appropriate Federal agency or agencies for the adjustment of such programs and regulations to the needs of small business.



## Appendix IV

Vote recorded December 18 1969 in the Senate on the question of whether Section 904 of HR15202 (Supplemental Appropriations Bill, 1970) was germane to the bill.

### Yeas - 52

Aitken	Ervin	Murphy
Allen	Fannin	Pearson
Allot	Fulbright	Proutty
Baker	Goldwater	Proxmire
Bennet	Gore	Randolph
Bible	Gurney	Saxbe
Burdick	Hansen	Smith, Maine
Byrd, Va.	Holland	Sparkman
Byrd, W. Va.	Hruska	Spong
Cannon	Jordan, NC	Stennis
Cook	Jordan, Idaho	Stevens
Cotton	Long	Talmadge
Curtis	Magnusson	Thurmond
Dodd	Mansfield	Williams, Del.
Dole	McClellan	Yarborough
Dominick	Metcalf	Young, ND
Eastland	Miller	Young, Ohio
Ellender		

### Nays - 37

Baye	Hart	Montoya
Bellmon	Hatfield	Moss
Boggs	Hughes	Muskie
Brooke	Jackson	Nelson
Case	Javits	Packwood
Church	Kennedy	Pastore
Cranston	Mathias	Pell
Eagleton	McCarthy	Schweiker

Fong	McGee	Scott
Goodell	McGovern	Smith, III.
Gravel	Macintyre	Tydings
Griffin	Mondale	Williams
Harris		

Vote Recorded December 22 1969 in the House of Congress on the motion put forward by Mr. Mahon from Texas that the House recede from its disagreement to the amendment of the Senate numbered 33 (HR15209). From CR 40921, 40922.

Y'EAS-156

Abernethy	Fuqua	O'Konskt
Addabbo	Galiflanakis	Olsen
Alexander	Gaydos	Passman
Anderson,	Gettys	Patman
Tenn.	Glaimo	Pepper
Ashbrook	Gray	Perkins
Baring	Griffln	Philbin
Bennett	Gross	Pickle
Blaggi	Grover	Preyer, N.C.
Blackburn	Hagan	Pryor, Ark.
Bray	Haley	Pucinsky
Brinkley	Hansen, Wash.	Purcell
Brooks	Harsha	Quillen
Brown, Calif.	Hays	Randall
Broyhill, N.C.	Henderson	Rarick
Broyhill, Va.	Hicks	Rivers
Burke, Mass.	Holifield	Roberts
Burleson, Tex.	Hungate	Roe
Burlison, Me.	Ichord	Rogers. Pla.
Cabel	Jarman	Rooney,Pa.
Casey	Johnson, Calif.	Roudebush
Chappell	Jonas	Ruth
Clancy	Jones, Ala.	St. Germain
Clark	Jones, N.C.	St. Onge
Clawson, Del	Jones, Tenn.	Satterfield
Collins	Karth	Scherle
Corbett	Kazen	Scott
Cramer	Kee	Shipley
Crane	King	Slack
Daniel, Va.	Kluezynski	Smith, Iowa
Daniels, N.J.	Kyros	Snyder
Davis, Ga.	Lennon	Steed
de la Garza	Long, La.	Steiger, Artz.

Denney	Long, Md.	Stubblefield
Derwinski	McDonald,	Stuckey
Devine	Mich.	Symington
Dingell	McFall	Taylor
Donohue	McMillan	Thompson, Ga.
Dorn	Macdonald,	Tiernan
Dowdy	Mass.	Ullman
Downing	Mahon	Vigorito
Duncan	Mann	Waggoner
Edmondson	Marsh	Wampler
Eilberg	Melcher	Watson
Fisher	Minshall	Watts
Flood	Mizell	Whitehurst
Flowers	Mollohan	Whitten
Flynt	Monagan	Wiggins
Ford,	Morgan	Williams
William D.	Murphy, Ill.	Yatron
Foreman	Myers	Young
Fountain	Natcher	Zablocki
Frey	Nedzi	
Fulton, Pa.	O'Hara	

NAYS-208

Adams	Button	Esch
Albert	Byrne, Pa.	Eshleman
Anderson,	Byrnes, Wis.	Evans, Colo.
Calif.	Camp	Feighan
Anderson, Ill.	Carter	Fish
Annunzio	Cederberg	Foley
Arends	Chamberlain	Ford, Gerald R.
Ashley	Chisholm	Fraser
Ayres	Clausen,	Prelinghuysen
Barrett	Don H.	Friedel
Beall, Md.	Clay	Gallagher
Belcher	Cleveland	Garmatz
Bell, Calif.	Cohelan	Gibbons
Betts	Conable	Gilbert
Biester	Conte	Gonzalez
Bingham	Corman	Goodling
Blatnik	Coughlin	Green, Pa.
Boggs	Cowger	Gubser
Boland	Culver	Gude
Bow	Cunningham	Halpern
Brademas	Daddario	Hamilton
Brasco	Davis, Wis.	Hanley
Broomfield	Dellenback	Hanna
Brotzman	Dennis	Hansen, Idaho
Brown, Mich.	Dickinson	Harrington
Brown, Ohio	Diggs	Hastings
Buchanan	Dulski	Hathaway
Burke, Pla.	Eckhardt	Hawkins
Burton, Calif.	Edwards, Ala.	Hechler, W. Va.
Bush	Erlenborn	Heckler, Mass.
Helstoski	Minish	Sebelius
Hogan	Mink	Shriver
Horton	Mize	Smith, N.Y.
Hosmer	Moorhead	Springer
Howard	Morton	Stafford

Hunt	Mosher	Staggers
Hutchinson	Murphy, N.Y.	Stanton
Jacobs	Nelsen	Steiger, Wis.
Kastenmeler	Nix	Stokes
Keith	Obey	Stratton
Kleppe	O'Neill, Mass.	Taft
Koeh	Ottinger	Talcott
Kuykendall	Patten	Teague, Calit.
Kyl	Pelly	Thompson, N.
Landgrebe	Pettis	Thomson, Wis
Langen	Pike	Tunney
Latta	Pirnle	Udall
Leggett	Podell	Utt
Lloyd	Price, Ill.	Van Deerlin
Lowenstein	Price, Tex.	Vander Jagt
Lujan	Quie	Vanik
Lukens	Railsback	Waldie
McCarthy	Reid, Ill.	Weicker
McCloskey	Reld, N.Y.	Whalen
McClure	Rhodes	Whalley
McCulloch	Riegle	White
MeDade	Robison	Widnall
MeEwen	Rodino	Wilson, Bob
McKneally	Rogers, Colo.	Wilson,
MaeGregor	Rooney, N.Y.	Charles H.
Madden	Rosenthal	Winn
Mailliard	Poth	Wold
Mathias	Roybal	Wyatt
Matsunaga	Ruppe	Wydler
May	Ryan	Wylie
Mayne	Sandman	Wyman
Meeds	Saylor	Yates
Meskill	Schadeberg	Zion
Michel	Scheuer	Zwach
Mikva	Schneebell	
Miller, Ohio	Schwengel	

ANSWERED "PRESENT"-1

Pollock

NOT VOTING-68

Abbitt	Edwards, La.	Montgomery
Adair	Evins, Tenn.	Morse
Andrews, Ala.	Fallon	Moss
Andrews,	Farbstein	Nichols
N. Dak.	Fassell	O'Neal, Ga.
Aspinall	Findley	Poage
Berry	Fulton, Tenn.	Poff
Bevill	Goldwater	Powell
Blanton	Green, Oreg.	Rees
Boiling	Griffiths	Relfel
Brock	Hall	Reuss
Burton, Ut	Hammer-	Rostenkowsk
Caffery	Schmidt	Sikes
Cahill	Harvey	Sisk
Carey	Hebert	Skubitz
Celler	Hull	Smith, Calif.
Collier	Johnson, Pa.	Stephens
Coliner	Kirwan	Sullivan
Conyers	Landrum	Teague, Tex.
Dawson	Lipscomb	Watkins
Delaney	McClory	Wolff
Dent	Martin	Wright
Dwyer	Miller, Calif.	
Edwards, Ca	Mills	

Source: *Congressional Record*, 91<sup>st</sup> Congress, Volume 115, 40921, 40922.

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White House Central Files: Staff Member and Office Files: Leonard Garment:  
White House Special Files: Staff Member And Office Files: H. R. Haldeman: Haldeman  
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White House Special Files: Staff Member and Office Files: Harry S. Dent  
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White House Special Files: Staff Member and Office Files: White House Special Files:  
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Washington DC**

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**Library of Congress, Washington DC**

Papers of Edward W. Brooke  
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